

No. 14737

United States
Court of Appeals
for the Ninth Circuit.

A. G. HOMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ANNA HOMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

A. G. HOMANN,

Respondent.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ANNA HOMANN,

Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court
of the United States

FILED

DEC - 3 1955

No. 14737

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COMMISSIONER OF INTERNAL REVENUE,

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A. G. HOMANN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

C. L. STICKNEY, ESQ.;

HARRY ELLSWORTH FOSTER, ESQ.

For Respondent:

JOHN O. DURKAN, ESQ.;

FRANCIS J. BUTLER, ESQ.

The Tax Court of the United States

Docket No. 37318

A. G. HOMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

* * *

1953

Oct. 21—Hearing had before Judge Oppen on the merits and oral motion of counsel to consolidate with Docket 37319, Granted. Stipulation of Facts filed; Briefs due 1/4/54; Replies due 2/19/54.

* * *

The Tax Court of the United States

Docket No. 37319

ANNA HOMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

* * *

1953

Oct. 21—Hearing had before Judge Oppen on the merits and oral motion of counsel to consolidate with Docket 37318, Granted. Stipulation of Facts filed; Briefs due Jan. 4, 1954, and Replies due Feb. 19, 1954.

[Title of Tax Court and Cause.]

Docket No. 37318

SECOND AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:90D:AAJ, dated July 27, 1951, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with principal office and residence at Lacey, Washington. The return for the period here involved was filed with the

collector for the district of Washington at Tacoma.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on July 27, 1951.

3. The deficiencies as determined by the Commissioner are in income taxes for the calendar year 1946 in the amount of \$10,148.95, of which approximately all of which is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a. The additions to income of alleged unreported range and refrigerator sales in amount of \$3109.44, and miscellaneous Sunnyside income of \$2340.38.

b. The addition to income of additional gain on the sale of houses of \$15,793.12.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

a. The houses were all equipped with refrigerators and ranges. Some occupiers had either a refrigerator or a range, or both, and did not desire to purchase or rent unless these items were removed, in consequence of which many were removed and sold for salvage. The amount of additional income assessed from the salvage of the refrigerators is \$3109.44, which should be taxed at the capital gains rate rather than as ordinary income because the petitioner was never in the business of selling second-hand ranges and refrigerators.

b. The furnaces were defective and removed. Three hundred twenty-five dollars was realized from

this source on July 23, 1946, and on November 8, 1946, the sum of \$350.00, a total of \$675.00, one-half of which amount should be allocated to the petitioner but which should be taxed at the capital gains rate rather than as ordinary income because the petitioner was never in the business of selling second-hand furnaces. The difference between \$2340.38 less \$337.50, or \$2002.88, is properly taxable as ordinary income.

c. Gain on sale of houses was incorrectly reported as to amount as there was a realized loss of \$5342.35 instead of a taxable gain of \$10,025.49. The sale of houses held primarily for rent comes within the scope of section 117 (j) in which a loss would be deductible in full and a profit is to be treated as a long-term capital gain.

Wherefore the petitioner prays that this Court may hear the proceedings and redetermine the deficiency due from the petitioner for the year 1946.

/s/ HARRY ELLSWORTH
FOSTER,

/s/ C. L. STICKNEY,
Counsel for Petitioner.

Duly verified.

EXHIBIT A

Treasury Department
Internal Revenue Service
Securities Building
Seattle 1, Washington

July 27, 1951.

Office of
Internal Revenue Agent in Charge,
Seattle Division.

IT:90D:AAJ.

Mr. A. G. Homann,
Lacey, Washington.

Dear Mr. Homann:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1946, discloses a deficiency of \$10,-148.95 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Seattle

1, Washington, for the attention of IT:90D:AAJ. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner;

By
Acting Internal Revenue
Agent in Charge.

Enclosures:

Statement

Form 1276

Form of waiver

AAJ:em

IT:90D:AAJ

Statement
Mr. A. G. Homann
Lacey, Washington

Tax Liability for the Taxable Year Ended December 31, 1946

	Deficiency
Income tax	\$10,148.95

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated October 1, 1948; to your protest dated November 2, 1948; and to the statements made at the conferences held on February 10, April 19, and June 7, 1949; May 18, October 12, and November 13, 1950, and May 21, 1951.

A copy of this letter and statement has been mailed to your

representative, Mr. C. L. Stickney, Security Building, Olympia, Washington, in accordance with the authority contained in the power of attorney executed by you.

Adjustment to Net Income

Net income as disclosed by return		\$15,669.80
Unallowable deductions and additional income:		
(a) Unreported range and refrigerator sales	\$ 3,109.44	
(b) Miscellaneous Sunnyside income	2,340.38	
(c) Gain on sale of houses	15,793.12	21,242.94
		<hr/>
Total		\$36,912.74
Nontaxable income and additional deductions:		
(d) Additional allowable depreciation		2,522.92
		<hr/>
Net income adjusted		\$34,389.82

Explanation of Adjustments

(a) Profit on sale of ranges and refrigerators in the Sunnyside housing project in the amount of \$6,218.88 was omitted in error from the community income reported in the returns of you and your wife, Anna Homann. Your community one-half of this amount is \$3,109.44.

(b) "Miscellaneous Sunnyside Income" in the amount of \$4,680.76 was omitted in error from the community income reported in the returns of you and your wife, Anna Homann. Your community one-half of this amount is \$2,340.38.

(c) It is held that the gain on sale of houses in the Sunnyside housing project reported in the community returns of you and your wife, Anna Homann, in the amount of \$10,025.49, was understated in the amount of \$31,586.23, of which your community one-half is \$15,793.12. The computation of reportable gain on the sale of these houses, as shown on the returns of you and your wife, is held to be incorrect in that:

(1) Depreciation allowed or allowable for 1945 and 1946 was not deducted from your basis in the houses sold.

(2) You deducted all of your remaining cost to December

31, 1946, in the housing project although your records show that two of the houses were sold in 1947 and not 1946.

(3) It is held that these houses were held primarily for sale in the ordinary course of your trade or business.

This adjustment of \$31,586.23 is computed as set forth below:

	Reported Per Returns	As Adjusted
Sale price of houses	\$453,659.98	\$453,659.98
Less: Expense of sales	18,310.75	18,310.75
Net amount realized on sales	\$435,349.23	\$435,349.23
Cost of houses sold	415,298.25	
Adjusted basis of houses sold		393,737.51*
Profit	\$ 20,050.98	\$ 41,611.72
Long-term capital gain, 50%	\$ 10,025.49	
As adjusted, ordinary income		\$ 41,611.72
Less: Profit reported		10,025.49
Understatement of profit		\$ 31,586.23
*Construction costs per return		\$415,298.25
Less: Cost of 2 houses sold in 1947	\$ 12,037.64	
Depreciation allowed or allow- able, 1946 and 1945, on houses sold in 1946	9,523.10 †	21,560.74
		\$393,737.51
†Unadjusted basis of 69 houses and lots unsold at 12-31-45		\$415,298.25
Less: Costs not subject to deprecia- tion:		
Land	\$19,453.86	
Cost of clearing title	6,146.93	
T r e e s, shrubbery and landscaping	2,713.99	\$ 28,314.78
Less: Non-depreciable cost of 16 houses sold in 1945 @ \$332.00 each	5,312.00	\$ 23,002.78

Reported
Per Returns As Adjusted

Basis, unadjusted, of 69 houses unsold at 12-31-45		\$392,295.47
Depreciation allowed on 69 houses in 1945 at 2½% per year, estimated at an average of 6 months after date of completion	\$ 4,903.69	
Less. Depreciation on 2 houses sold in 1947	142.14	\$ 4,761.55
Depreciation allowable in 1946, estimated at an average of 6 months from Jan. 1 to dates of sale		4,761.55
Depreciation allowable on houses sold in 1945		\$ 9,523.10

(d) Depreciation allowable in 1946 on Sunnyside housing project units, not claimed as deduction in the returns of you and your wife, Anna Homann, is computed as follows:

Depreciation on 69 houses at 2½% at an average of 6 months as shown above	\$4,903.69
Plus: Depreciation for an additional 6 months on 2 houses sold in 1947	142.14
Total depreciation allowable in 1946, not claimed	\$5,045.83

Your community one-half of this additional deduction is \$2,522.92.

Computation of Tax

Net income adjusted	\$34,389.82	
Minus: Excess of net long-term capital gain over net short-term capital loss		127.50
Ordinary net income	\$34,262.32	
Less: Exemptions	1,500.00	
Normal tax and surtax net income	\$32,762.32	
Tentative income tax on \$32,762.32		\$14,955.51
Less: 5% reduction		747.78
Partial Tax		\$14,207.73
Plus: 50% of excess of net long-term capi- tal gain over net short-term capital loss		63.75
Income tax liability		\$14,271.48
Income tax liability disclosed by return, Original Account No. 6300045		4,122.53
Deficiency in income tax		\$10,148.95

Lodged February 1, 1954.

Filed March 2, 1954, T.C.U.S.

[Title of Tax Court and Cause.]

ANSWER TO SECOND AMENDED PETITION

Comes Now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to second amended petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the second amended petition.

2. Admits the allegations contained in paragraph 2 of the second amended petition.

3. Admits the allegations contained in paragraph 3 of the second amended petition.

4. Denies that he erred in his determination of the deficiency in income tax as shown by the notice of deficiency from which the appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph 4(a) and (b) of the second amended petition.

5. (a) Admits that the amount of additional income is \$3,109.44. Denies the remaining allegations contained in paragraph 5(a) of the second amended petition.

(b) Admits that \$2,002.88 is properly taxable as ordinary income. Denies the remaining allegations contained in paragraph 5(b) of the second amended petition.

(c) Denies the allegations contained in paragraph 5(c) of the second amended petition.

6. Denies generally and specifically each and every material allegation contained in the second amended petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that petitioner's appeal be denied and that the Commissioner's determination be approved.

/s/ DANIEL A. TAYLOR,

Chief Counsel, Internal Revenue Service.

Of Counsel:

MELVIN L. SEARS,

Regional Counsel;

FRANCIS J. BUTLER,

Attorney, Internal Revenue
Service.

Filed April 30, 1954, T.C.U.S.

Served May 3, 1954.

[Title of Tax Court and Cause.]

Docket Nos. 37318 and 37319

MEMORANDUM FINDINGS OF
FACT AND OPINION

Opper, Judge:

Respondent determined deficiencies in the income taxes of petitioners A. G. Homann and Anna Homann in the amounts of \$10,148.95 and \$10,457.70, respectively, for the taxable year 1946. The questions to be decided are (1) whether gain realized from the sale of certain houses during the year in controversy should be treated as capital gain rather than ordinary income; (2) if those houses were property used in a trade or business, whether their basis should be reduced by the amount of depreciation allowed or allowable thereon; and (3) whether petitioners omitted from their tax returns for the year in controversy certain gain realized

from the sale of furnaces, ranges and refrigerators. An amount received in connection with a construction contract is not now contested by petitioners as being taxable as ordinary income in the year 1946.

Findings of Fact

Some of the facts have been stipulated and are found accordingly.

A. G. Homann, hereinafter called petitioner, and Anna Homann, his wife, resided in Olympia, Washington, a community property state, at all times material herein. They filed separate income tax returns for the years 1945, 1946 and 1947 with the collector for the district of Washington.

Petitioner is a general contractor in Olympia, Washington. At the present time he maintains his office in Lacey, Washington, which is about 4 miles east of Olympia, Washington. Petitioner has been engaged in the general contracting business for 30 years, and is a member of the Associated General Contractors of America.

Petitioner's contracting business is conducted by him, individually, under the name of A. G. Homann, General Contractor. No one else has any proprietary interest in his business.

During World War II, petitioner worked on war projects. Some time prior to July, 1944, the Hanford Engineering Works, hereinafter sometimes called Hanford, requested that 100 single-dwelling homes be built to house 100 of its employees. Petitioner first learned about the proposed project from

some friends at the Seattle regional office of the Federal Housing Authority, hereinafter referred to as F. H. A. After finding out about the project, petitioner went to Sunnyside, Washington, and talked to a committee which had been formed to promote the construction of such houses.

After investigating what he had heard, petitioner agreed to proceed with the construction of the houses. In or about July, 1944, petitioner started construction on 85 single-dwelling houses in Sunnyside, Washington. Another contractor in Sunnyside built the remaining 15 houses desired by Hanford.

Petitioner constructed his houses on a tract of land which he purchased, replatted and recorded as Homann's Addition to Sunnyside. At least 100 lots were purchased. F. H. A. required that the lot for each house be not less than 60 feet wide. Petitioner's plat was submitted to F. H. A. and the houses were all approved by that agency. F. H. A. places a ceiling on borrowing in connection with its authorized projects.

When petitioner first learned about the project he was told that he could rent or sell only to Hanford employees. Early in the spring of 1945 Colonel Mathias, who was in charge of Hanford, advised petitioners' representative, Beckwith, without previous warning, that the Hanford employees were to be moved to Oak Ridge, Tennessee, and that henceforth there would be no Hanford employees available to occupy the houses.

None of the houses were ever rented or sold to Hanford employees.

The houses were completed in the spring of 1945. Lawns and shrubs were put in later when the ground was dry enough to work.

In order to finance this project, petitioner had borrowed about \$450,000 through Sherrill and Roberts, the lending agency for the project. Petitioner paid approximately \$20,000 for the land and his own investment in the project fluctuated between \$20,000 and \$60,000. The amount paid by petitioner for the land and the labor met the minimum requirements necessary to obtain this loan. In May, 1944, petitioner also borrowed \$45,000 from the National Bank of Commerce in Olympia, Washington.

The restrictions on renting and selling solely to the Hanford employees not being effective, petitioner conducted a radio campaign over Station KIT in Yakima, Washington. This program lasted for 2 months and consisted of spot announcements. It was handled by Beckwith and petitioner approved the plan. All of the houses were rented in 1945, before any sales were consummated.

Petitioner rented the houses on a month-to-month basis. There were no written leases. There were several oral agreements entered into whereby rent would be credited to the purchase price. These agreements amounted to a rental arrangement with an option to buy. All tenants who wanted to buy could have this arrangement.

F. H. A. restrictions through the latter part of 1945 allowed up to 20 per cent of its authorized

housing to be sold. The balance had to be rented. Sixteen of petitioner's houses, approximately 20 per cent, were sold in 1945. Sixty-eight of the houses were sold in 1946, after removal of all F. H. A. restrictions on percentage of sales. Only 1 house remained unsold at the end of 1946. This house, the one occupied by Beckwith as an officer, was sold in 1947, and a commission of \$300 was paid on the sale. All of the houses were sold to individuals. Each purchaser refinanced his purchase, and the proceeds of his mortgage were used to retire the original mortgage loan. Sales were negotiated continuously throughout the years material herein, beginning in April, 1945. The sales were closed in groups at irregular intervals because the lending agencies which refinanced the purchases would not process individual mortgage loans, but required petitioner to wait until a group could be accumulated.

At all times material herein, the houses were under rent control. This restriction did not change by reason of the removal of the Hanford plant and the elimination of restrictions on public rental.

Petitioner has never built any houses on his own account which were sold to others except the houses in controversy herein. He has never had a real estate broker's license. He had never previously built houses on his own account for rental purposes.

Horace Miller was a real estate agent in the town of Sunnyside during all years material herein, and served as petitioner's agent in the handling of money transactions. Miller was not the only real estate agent in Sunnyside. Miller was to get a 5 per

cent commission for collecting and transmitting rents to petitioner and a 2½ per cent commission on the sale of the houses. He always had authority to sell the houses if he found a buyer.

Miller took a deposit on the sale of a house in September, 1944. Miller had reason to believe that he was acting in petitioner's behalf.

Petitioner reported the gain realized on the sale of the 16 houses sold in 1945 as short-term capital gain. Petitioner had been in doubt as to whether those houses had been held for the 6 months necessary to qualify for capital gains treatment. Those houses were all sold to people who purchased without solicitation.

Sales of the 68 houses sold in 1946 were made to people who came in to purchase voluntarily. No "for sale" signs were ever displayed on any of the houses, and such advertisements were not carried in the newspaper.

The town of Sunnyside doubled in population during the period in controversy and petitioner's houses were selling without difficulty. At this time veterans of World War II were coming back and wanted homes. Most of the houses were sold to returning veterans. It was not necessary to put "for sale" signs up or to conduct a selling campaign.

Miller kept separate account of the income from rentals and the income from sales after August 1, 1945.

In 1945, petitioner had started the construction of a cannery building in Olympia on a fixed fee basis for the Midfield Packers, a co-partnership,

pursuant to an oral contract. The estimated cost of that building was in excess of \$200,000. Financial difficulties enveloped the Midfield Packers in the fall of 1945 at which time petitioner had invested between \$50,000 and \$60,000 in the building. Petitioners filed a lien and instituted suit to foreclose it. The building was only partially constructed at that time. A foreclosure decree was entered and appealed to the Supreme Court of the State of Washington. Judgment of foreclosure was entered September 9, 1949, and upheld on appeal March 9, 1951. Petitioner subsequently completed the building at an additional cost of approximately \$96,000.

At the time of the hearing herein, petitioner still owned this building. The first floor was rented to the Olympia Brewing Company at a monthly rental of \$1,250, and the upper floor was rented to the State of Washington at a monthly rental of \$450.

Petitioner did not know how much activity was carried on by Miller in selling his 85 houses. Petitioner's superintendent did not know how much sales activity was carried on by Miller.

Beckwith was employed by petitioner from 1941 until 1949 as an assistant and in this capacity he had charge of the houses and looked for prospective new business. He was the only employee retained permanently and he lived in one of the houses which served as his office. Beckwith received a weekly wage.

The houses were relatively new when they were sold and few repairs were necessary in order to improve the marketability.

After the houses were completed petitioner went to the project no more than once every 4 or 5 months.

The total cost of the 85 houses, according to the Sunnyside books, was \$515,539.82. Petitioner charged off \$94,133.57 on the 1945 income tax return and \$415,298.25 on the 1946 income tax return. On his 1946 income tax return, petitioner also charged off the amount of \$18,310.75 under the heading of expenses of sale and cost of improvements subsequent to acquisition.

In petitioner's 1945 individual income tax return the sales of the houses were listed under a schedule entitled short-term capital assets. Under the heading of "date acquired" the houses were listed as having been acquired July 1, 1945. Under the heading, "date sold," 15 of the houses were listed as having been sold September 1, 1945, and one house was listed as having been sold August 1, 1945. The respective gain on the sale of these houses in the amount of \$10,306.43 was included in income as net short-term capital gain. On a schedule attached to petitioner's 1945 income tax return the cost of the Sunnyside houses was shown at \$500,533.57 (84 houses at \$5,890 each and 1 house at \$5,773.57).

On petitioner's 1946 individual income tax return the gain on the sale of the 68 houses was included under long-term capital gains and losses with the date sold being listed as October through December, 1946.

In 1945, petitioner's income from rents was \$4,892.85. His income from sales of the houses was \$10,306.43. Rental expenses totaled \$9,606.53. Ex-

penses included interest, taxes, insurance and utilities, but nothing for depreciation or salary to Beckwith.

In 1946, the income from rents showed a loss of \$1,034.25. Repairs were deducted in the amount of \$14,828.98 and other expenses totaled \$2,454.36. Income from sales in that year was \$20,050.98.

The houses were originally equipped with refrigerators and ranges. Some occupiers owned their own refrigerators or ranges and did not desire to purchase or rent a house unless these items were removed. Many were removed and sold for salvage value. Petitioner realized \$6,218.88 from the salvage of the refrigerators. Petitioners were never in the business of selling second-hand ranges and refrigerators.

Some furnaces were defective and removed. \$325 was realized from their partial disposition on July 23, 1946. On November 8, 1946, the sum of \$350 was realized therefrom. Petitioners were never in the business of selling second-hand furnaces.

The houses which petitioner sold in the taxable year 1946 were held primarily for sale to customers in the ordinary course of petitioner's business.

Opinion

I.

Such elements as serve to distinguish *Mauldin v. Commissioner* (C. A. 10), 195 F. 2d 714, and *Rollingwood Corp. v. Commissioner* (C. A. 9), 190 F. 2d 263, on the one hand from *Victory Housing No. 2 v. Commissioner* (C. A. 10), 205 F. 2d 371, and

McGah v. Commissioner (C. A. 9), 210 F. 2d 769, on the other preponderate in requiring that the factual question, see Rubino v. Commissioner (C. A. 9), 186 F. 2d 304, certiorari denied 342 U. S. 814, be determined in respondent's favor. Our ultimate finding accordingly disposes of the primary issue.

Unlike the situation in McGah v. Commissioner, *supra*, the original purpose for which the houses in controversy were to be erected was frustrated before the operation really began. The evidence shows that petitioner could not have constructed the houses for rent to the employees of Hanford Engineering Works because the war plant in which they were to be employed had already been located elsewhere. On the contrary, even before it was built, one house was tentatively sold in 1944 from the plans. In the years 1945 and 1946 an almost uninterrupted succession of sales¹ took place; so that by the end of 1946 but one house remained and that was sold in the following year. Unlike Victory Housing none were retained for rental when restrictions expired. It is true that the houses were rented upon completion but the tenancies were from month-to-month and the evidence shows that some included an en-

¹Petitioner testified that his working capital was frozen in the fall of 1945 and that he could not obtain further bank credit. In spite of this he makes much of the fact that throughout the year 1946 his salable assets upon which all selling restrictions had been removed were not in any way being pressed as a source of capital funds. We find it so difficult to reconcile these two statements that we have omitted any finding of fact based upon them.

couragement to the tenant to purchase by not only conferring an option upon him to do so but providing for an application on the sales price of prior rental payments. See *Rollingwood Corp. v. Commissioner*, *supra*.

The evidence further shows not only that the great bulk of petitioner's income from this venture throughout its duration was from sales rather than rent but that at the level of rent being received no profit could be hoped for; the only means by which the venture was susceptible of final success was the sale of the units.

While it is true that petitioner made no direct advertising or promotional drive to dispose of these properties, the factor is neutral since the evidence shows that sales were taking place in the "seller's market" of the period without undue effort. *Mauldin v. Commissioner*, *supra*. And petitioner did employ a real estate agent who apparently was assured of sufficient business from the venture so that he agreed to accept a commission of only 2½ per cent instead of the usual 5 although it is not clear whether the commission was to be paid on all units sold or only on those in which the broker participated. In either event a considerable, continuous, and constant operation of sales apparently was envisaged.

Finally as we have already suggested, the number and continuity of the sales² make it almost impos-

²We have been unable to find the details of time and number of sales for lack of evidence. The conclusion, however, seems undisputed, and in any event petitioner cannot benefit by his failure to introduce more specific evidence.

sible by any recognized test to conclude that this was not a selling business. Although at one time restrictions were placed upon the number of sales, the implication is that as many sales were made as could be. And the methodical and systematic disposal of the entire development within virtually a 2-year period appears to us to call inescapably for the conclusion of fact set forth in our finding.

For the reasons stated we are satisfied that respondent properly charged petitioner with ordinary income rather than capital gain.

II.

By the same token, however, respondent erred in reducing petitioner's basis on account of depreciation "allowable." Since we have concluded that from the inception petitioner held the property primarily for sale it would not qualify for the "use in trade or business" requirement of the depreciation deduction. In fact, we do not read respondent's contentions as seriously opposing this view.

III.

Nor do we think the deficiency was proper in failing to include the basis of all but one of the houses in total cost. While one of the exhibits appears to show that 2 houses remained unsold at the end of the tax year other indications satisfy us that this was a typographical error and that only one house remained to be disposed of. We have so found.

IV.

In placing some of the properties in proper condition it apparently became necessary for petitioner to remove some furnaces, ranges and refrigerators. These were subsequently sold for their salvage value and respondent insists that this income also is ordinary income and not capital gain. We are unable to agree.

Whatever petitioner's business as builder, developer and seller of finished houses, he was clearly not in the business of selling used or secondhand equipment. These items were not held for sale in the ordinary course of petitioner's business.

Nor is there doubt as to the holding period. The evidence shows that the project was completed in early 1945. The sales in question took place in 1946. It follows that whatever equipment was included in the original properties must have been held more than 6 months when it was ultimately disposed of.

Decisions will be entered under Rule 50.

Received December 10, 1954.

Served December 20, 1954.

Filed December 20, 1954.

The Tax Court of the United States

Docket No. 37318

A. G. HOMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Respondent having on February 28, 1955, filed a recomputation of tax for entry of decision as in accordance with Memorandum Findings of Fact and Opinion of the Court, filed December 20, 1954, and petitioner having concurred therein, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year 1946 in the amount of \$5,922.70.

[Seal] /s/ CLARENCE V. OPPER,
Judge.

Entered March 1, 1955.

Served March 2, 1955.

The Tax Court of the United States

Docket No. 37319

ANNA HOMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Respondent having on February 28, 1955, filed a recomputation of tax for entry of decision as in accordance with Memorandum Findings of Fact and Opinion of the Court, filed December 20, 1954, and petitioner having concurred therein, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year 1946 in the amount of \$6,202.94.

[Seal] /s/ CLARENCE V. OPPER,
Judge.

Entered March 1, 1955.

Served March 2, 1955.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 37318

A. G. HOMANN,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

PETITION FOR REVIEW

Comes now A. G. Homann by his Counsel, Harry Ellsworth Foster, and petitions the United States Court of Appeals for the Ninth Circuit to review the decision of the Tax Court of the United States entered in the above cause on the 1st day of March, 1955, ordering and deciding that there is a deficiency in petitioner's federal income tax for the calendar year 1946 in the sum of \$5,922.70.

The tax return of the petitioner for 1946 was filed with the Commissioner of Internal Revenue for the District of Washington at Tacoma, Washington. The United States Court of Appeals for the Ninth Circuit is the Court of Appeals for the circuit in which said collector's office is located.

/s/ HARRY ELLSWORTH FOSTER,
Counsel for Petitioner.

Proof of service attached.

Received and filed March 31, 1955, T.C.U.S.

[Title of Court of Appeals and Cause.]

Tax Court Docket No. 37318

NOTICE OF FILING PETITION
FOR REVIEW

To: Daniel A. Taylor, Chief Counsel, Internal Revenue Service, Internal Revenue Building, 12th and Constitution Avenue, Washington 25, D. C.

You are hereby notified that the petitioner, A. G. Homann, did, on the 28th day of March, 1955, send air mail, with air mail postage attached, to the Clerk of the United States Tax Court for filing a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause. That the said petition for review will be received by the Clerk of the United States Tax Court and filed in that office on the 30th day of March, 1955. Copies of the petition for review and the statement of points as filed are hereto attached and served upon you.

Dated at Olympia, Washington, this 28th day of March, 1955.

Respectfully,

/s/ HARRY ELLSWORTH FOSTER,
Counsel for Petitioner.

Proof of Service

I hereby certify that I served the foregoing Notice of Filing Petition for Review on Daniel A. Taylor,

Chief Counsel for the Bureau of Internal Revenue, attorney for the Commissioner of Internal Revenue, Respondent on Review, by depositing a copy of the same in the Post Office at Olympia, Washington, with air mail postage prepaid, addressed to said attorney at his post office address, namely, Internal Revenue Building, 12th and Constitution Avenue, Washington 25, D. C., on March 28, 1955.

/s/ HARRY ELLSWORTH FOSTER,
Counsel for Petitioner on Review.

Received and filed March 31, 1955, T.C.U.S.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 37319

ANNA HOMANN,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

PETITION FOR REVIEW

Comes now Anna Homann by her counsel, Harry Ellsworth Foster, and petitions the United States Court of Appeals for the Ninth Circuit to review the decision of the Tax Court of the United States

entered in the above cause on the 1st day of March, 1955, ordering and deciding that there is a deficiency in petitioner's federal income tax for the calendar year 1946 in the sum of \$6,202.94.

The tax return of the petitioner for 1946 was filed with the Commissioner of Internal Revenue for the District of Washington at Tacoma, Washington. The United States Court of Appeals for the Ninth Circuit is the Court of Appeals for the circuit in which said collector's office is located.

/s/ HARRY ELLSWORTH FOSTER,
Counsel for Petitioner.

Proof of service attached.

Received and filed March 31, 1955, T.C.U.S.

[Title of Court of Appeals and Cause.]

Tax Court Docket No. 37319

NOTICE OF FILING PETITION
FOR REVIEW

To: Daniel A. Taylor, Chief Counsel, Internal Revenue Service, Internal Revenue Building, 12th and Constitution Avenue, Washington 25, D. C.

You are hereby notified that the petitioner, Anna Homann, did, on the 28th day of March, 1955, send air mail, with air mail postage attached, to the Clerk of the United States Tax Court for filing a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax

Court of the United States heretofore rendered in the above-entitled cause. That the said petition for review will be received by the Clerk of the United States Tax Court and filed in that office on the 30th day of March, 1955. Copies of the petition for review and the statement of points as filed are hereto attached and served upon you.

Dated at Olympia, Washington, this 28th day of March, 1955.

Respectfully,

/s/ HARRY ELLSWORTH FOSTER,
Counsel for Petitioner on Review.

Proof of Service

I hereby certify that I served the foregoing Notice of Filing Petition for Review on Daniel A. Taylor, Chief Counsel for the Bureau of Internal Revenue, attorney for the Commissioner of Internal Revenue, Respondent on Review, by depositing a copy of the same in the Post Office at Olympia, Washington, with air mail postage prepaid, addressed to said attorney at his post office address, namely, Internal Revenue Building, 12th and Constitution Avenue, Washington 25, D. C., on March 28, 1955.

/s/ HARRY ELLSWORTH FOSTER,
Counsel for Petitioner on Review.

Received and filed March 31, 1955, T.C.U.S.

[Title of Court of Appeals and Cause.]

Tax Court Docket No. 37318

STATEMENT OF POINTS

The following are the points on which the petitioner intends to rely on review:

The Tax Court of the United States erred:

1. In holding that the petitioner's gain on sixty-eight houses was properly charged to him as ordinary income rather than capital gain.

2. In finding that the houses which the petitioner sold in the taxable year 1946 were held primarily for sale to customers in the ordinary course of the petitioner's business.

3. In failing to find that the petitioner was never engaged in the real estate business.

4. In failing to find that the insolvency in the fall of 1945 of the Midfield Packers froze petitioner's working capital and further bank credit was denied him, and that he was obliged to liquidate the sixty-eight houses in question in order to save the rental investment in the Olympia cannery building.

5. In failing to find that prior to the affirmance of the decree of foreclosure on the Olympia cannery building March 9, 1951, petitioner could neither borrow on the Olympia cannery building or sell it.

6. In failing to find that the sale of the sixty-eight houses in the calendar year 1946 was for the

purpose of liquidating one capital asset held for rental purposes in order to save a more desirable capital asset held for rental purposes and still held for rental purposes.

/s/ HARRY ELLSWORTH FOSTER,
Counsel for Petitioner on Re-
view.

Proof of service attached.

Received and filed March 31, 1955, T.C.U.S.

[Title of Court of Appeals and Cause.]

Tax Court Docket No. 37319

STATEMENT OF POINTS

The following are the points on which the petitioner intends to rely on review:

The Tax Court of the United States erred:

1. In holding that the petitioner's gain on the sixty-eight houses was properly charged to her as ordinary income rather than capital gain.

2. In finding that the houses which the petitioner sold in the taxable year 1946 were held primarily for sale to customers in the ordinary course of the petitioner's business.

3. In failing to find that the petitioner was never engaged in the real estate business.

4. In failing to find that the insolvency in the fall of 1945 of the Midfield Packers froze peti-

tioner's working capital and further bank credit was denied her, and that she was obliged to liquidate the sixty-eight houses in question in order to save the rental investment in the Olympia cannery building.

5. In failing to find that prior to the affirmance of the decree of foreclosure on the Olympia cannery building March 9, 1951, petitioner could neither borrow on the Olympia cannery building or sell it.

6. In failing to find that the sale of the sixty-eight houses in the calendar year 1946 was for the purpose of liquidating one capital asset held for rental purposes in order to save a more desirable capital asset held for rental purposes and still held for rental purposes.

/s/ HARRY ELLSWORTH FOSTER,
Counsel for Petitioner on Review.

Proof of service attached.

Received and filed March 31, 1955, T.C.U.S.

[Title of Tax Court and Cause.]

Docket Nos. 37318 and 37319

STIPULATIONS OF FACTS

It is hereby stipulated and agreed by and between the parties and their respective counsel that the following facts shall be taken as true subject, however, to the right of either party to introduce further evidence not inconsistent herewith.

1. The petitioners herein are husband and wife and at all times material hereto have resided at 112 No. Franklin in Olympia, Washington.

2. In the years 1945, 1946 and 1947 petitioners filed their income tax returns with the Collector of Internal Revenue for the District of Washington. Such income tax returns are attached hereto marked exhibits 1-A, 2-B, 3-C, 4-D, 5-E, and made a part hereof by reference.

3. On or about July of 1944, petitioners started construction on eighty-five single dwelling houses in Sunnyside, Washington. These houses were completed in the spring of 1945.

4. In 1945 petitioner sold 16 houses. In 1946 petitioner's claim to have sold 68 houses and in arriving at gain on the sale of the houses in 1946, petitioner has claimed the cost of the 68 houses. Petitioner now admits that one house remained unsold at the end of 1946. This house was located at 801 10th Street and was occupied by Mr. H. G. Beckwith.

5. The respondent herein contends that two houses were sold in 1947 and that their cost must not be used in computing the gain on the sale of houses in 1946. The Government's contention is partially predicated upon the following statement taken from a statement sent to petitioner by Horace L. Miller which was found in petitioner's records of a sale in 1947:

Sale of Lot 11, Block 4, Homann's Sub- division, 901 10th Street, Sunnyside, to Alma W. Hallstrom. Net price		\$6,500.00
7 months rent, Dec. 1st to July 1st, paid by Hallstrom at \$45.00 per month, 5% com- mission on rental	\$ 15.75	
Title insurance	52.50	
Pay off old mortgage as per figure given Miller by Art. Hamman of CH&H:		
Principal	\$5,069.96	
Interest 4-1 to 8-1	76.04	
Penalty	53.00	5,199.00
Check to balance	1,547.75	
	<hr/>	<hr/>
	\$6,815.00	\$6,815.00

6. The total cost of 85 houses per the Sunnyside books was \$515,539.82. Petitioner charged off \$94,-133.57 on the 1945 income tax return. On the 1946 income tax return the petitioner charged off \$415,-298.25.

The petitioner claimed no depreciation in either 1945 or 1946.

/s/ HARRY ELLSWORTH FOSTER,
Counsel for Petitioners.

/s/ KENNETH W. GEMMILL, W.H.P.
Acting Chief Counsel, Internal Revenue Service,
Counsel for Respondent.

Filed at hearing October 21, 1953, T.C.U.S.

In the Tax Court of the United States
Docket Nos. 37318 and 37319

A. G. HOMANN and ANNA HOMANN,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Wednesday, October 21, 1953

The above-entitled matter came on for hearing,
pursuant to notice to the parties, at 10:30 o'clock,
a.m.

Before: Honorable Clarence V. Oppen, J.,
Presiding.

Appearances:

HARRY ELLSWORTH FOSTER, ESQ.,
For the Petitioners.

FRANCIS J. BUTLER,
For the Respondent.

* * *

Mr. Foster: You agreed that the Sunnyside books might be admitted in evidence and I ask that the smaller volume be marked as petitioners' Exhibit No. 1?

The Court: It will be received and marked as petitioners' Exhibit No. 1.

(Petitioners' Exhibit No. 1 was marked for identification.)

Mr. Foster: I ask that this record be marked as petitioners' Exhibit No. 2?

Mr. Butler: No objection.

The Court: It will be received and marked as petitioners' Exhibit No. 2.

(Petitioners' Exhibit No. 2 was marked for identification.)

Mr. Foster: I ask that there be marked as petitioners' [13*] Exhibit No. 3, the ledger sheets of Horace L. Miller, showing the house sales?

The Court: They may be received and marked Exhibit No. "3."

(Petitioners' Exhibit "3" is marked and received in evidence.)

Mr. Butler: I would request that petitioners make a statement for the purpose of introducing the rental records.

Mr. Foster: My principal purpose is to show that the rentals and sales were separately kept.

The Court: They may be received and marked as petitioners' Exhibit No. 4.

(Petitioners' Exhibit No. 4, marked and received in evidence.)

Mr. Foster: I ask that the escrow records of Horace L. Miller be marked and received, for the same purpose?

Mr. Butler: No objection.

The Court: They may be received and marked as petitioners' Exhibit No. 5.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Petitioners' Exhibit No. 5 is marked and received in evidence.)

Mr. Butler: The rental records and files of sales are kept in two different bound sheets of paper. Originally they started out, petitioners will admit, under the same [14] heading and subsequently there was a transfer which shows they were kept separately.

Mr. Foster: I am unable to answer that. Those I received myself a year ago from Horace L. Miller. He is a real estate man in Sunnyside and since this started has suffered a paralytic stroke and is incapacitated and could not carry on a coherent conversation. I don't know.

A. G. HOMANN

was called as a witness by and on behalf of the petitioners, and having been first duly sworn was examined and testified as follows:

The Clerk: State your name, please?

The Witness: A. G. Homann.

Direct Examination

By Mr. Foster:

Q. Your name, please?

A. A. G. Homann.

Q. Where do you reside?

A. Lacey, Washington.

Q. Where is that with reference to Olympia?

A. It is about four miles east of Olympia.

Q. What is your business?

(Testimony of A. G. Homann.)

A. General contracting.

Q. How long have you been so engaged?

A. For thirty years. [15]

Q. Under what name is your business conducted?

A. A. G. Homann, General Contractor.

Q. Is there anyone else interested in that business? A. No, there is not.

Q. When did you first come to Olympia?

A. In the fall of 1939.

Q. Has anyone else been interested in the business since that date? A. No, sir.

Q. Will you describe to the court the circumstances, in your own way, of this Sunnyside project coming to your notice?

A. During World War Two I engaged entirely in war work. I closed the office in Olympia and opened an office at McChord Field and put all my efforts into war efforts. It was requested by the Hanford Engineering Works that there be one hundred single dwelling homes built privately in Sunnyside to house one hundred of their employees and I was told that it was the most vital project to end the war we would have in the United States. Owing to that fact I decided to go and build the hundred houses. In Sunnyside there was a small builder that would like to have fifteen of the houses, so he built the fifteen and I built eight-five. I built these houses to rent to the employees of the Hanford Engineering—— [16]

Mr. Butler: I would prefer these questions to be

(Testimony of A. G. Homann.)

questions and answers. There are a lot of things going in which I don't feel are the best evidence.

Q. Was the existence of that project communicated to you orally or in writing?

A. It was communicated to me—one time I was over to Seattle to the F.H.A. and I knew some of them pretty well and they told me at that time that this was coming up and it might be something I would be interested in.

Q. What did you do with respect to that project? What was the first step?

A. I went to Sunnyside to investigate further in regard to what I heard.

Q. Approximately when was that?

A. Oh, I cannot tell exactly.

Q. Approximately?

A. I believe it was the middle part, a little before the middle part of 1944.

Q. Did you proceed with the construction of the houses? A. Yes.

Q. What tract of land, if any, did you buy for that project?

A. I bought several tracts of land and replatted and had it recorded as "Homann's Addition to Sunnyside." [17]

Q. At that time what was the population of Sunnyside?

A. Around twenty-five hundred.

Q. In area about how much land did you buy?

A. I bought——

Mr. Butler: Object. If he bought land I think

(Testimony of A. G. Homann.)

there would be documents or records that certainly would be the best evidence of it. Up to this time he was questioned if he had contracts and he didn't know. I insist to protect the government's interest if there is documentary evidence of this it is the best evidence.

Mr. Foster: It is purely preliminary.

A. I just wanted you to understand I bought land sufficient to erect eighty-five houses on.

The Court: It is part of this case or it is not.

Mr. Foster: I offer to prove by this witness now on the stand, that he purchased in 1944 a sufficient area of land on which he might construct eighty-five houses.

Mr. Butler: It is impossible for the government to know when he purchased the land or how much he purchased it for. That should be put in by documents.

Mr. Foster: The price in the documents would only show "Ten dollars and other consideration."

The Court: I sustain the objection. You have your offer of proof in. Go ahead.

Mr. Butler: As I told you in my opening statement [18] I assume there is some documentary evidence on a lot of this. I don't like to take objections all the time. If I could make an objection now and argue it in the brief——

The Court: If you want to make an objection make it when the question is asked and before it is answered. I will rule on it at that time.

Q. When did you start construction of these houses? A. Somewhere in July of 1944.

(Testimony of A. G. Homann.)

Q. When were they completed?

A. Early in the spring of 1945.

Q. How many did you build?

A. Eighty-five.

Q. What was the purpose of building the eighty-five houses?

A. To rent to the Hanford Engineering employees.

Q. Did you at any time receive any communication that you would be unable to rent to the Hanford Engineering employees?

A. I got a call from——

Q. You can answer yes or no.

A. Yes.

Q. Approximately when was it?

A. Early in 1945, to my knowledge.

Q. How was it communicated to you?

A. Over the 'phone by my representative in Sunnyside, [19] Mr. Beckwith.

Q. What was the communication?

A. That Colonel Mathias had come to our office in Sunnyside——

Mr. Butler: Object. It is hearsay if Mr. Beckwith received the communication and then told Mr. Homann about it. Mr. Beckwith might be able to testify to the conversation with the Colonel, but certainly not Mr. Homann.

Mr. Foster: I am asking this witness to tell what information he received on that job. He received the information from his employee on the project. Besides, Mr. Beckwith is here.

(Testimony of A. G. Homann.)

A. In 1945 I started to build a building, a can-
nery, [22] for the Midfield Packing Company. I
built it on a fixed-fee basis and everything went
swell until along toward the end, or the fall, of
1945, when some of their frozen products went bad
and they didn't get their money and consequently
they didn't pay me and I had between fifty and
sixty thousand dollars of my own money tied up in
that project.

Mr. Butler: I object at this point.

The Court: There is no question pending.

Mr. Butler: The question was asked when he
changed his mind. My point is he has gone beyond
that. It is not responsive.

The Court: Your procedure is to move to strike.

Mr. Butler: Yes, I am sorry. I move to strike.

The Court: What part?

Mr. Butler: The part relating to building the
building he mentioned and any matter pertaining to
financial losses or other financial receipts pertaining
to that building on the ground there should be other
documentary evidence which would be the best evi-
dence when that was started and the whole picture
of it.

The Court: I misunderstood you. I thought you
said he is now testifying to matters not responsive
to the question.

Mr. Butler: You suggested that the question had
not been asked. I say a question was asked and he
went [23] beyond the scope, and I also object to

(Testimony of A. G. Homann.)

what is coming out as not the best evidence of the transaction.

The Court: I am sorry but I cannot recall entirely what the matter was but if he has personal knowledge of the building being started then because he saw it with his own eyes, that is the best evidence. If you pinpoint what you say is objectionable.

Mr. Butler: The objectionable part is—he started the building. That is one thing. But he testified to finances, what he put in, how much he lost at one point, and I don't think his testimony is the best evidence.

The Court: Denied, and I suggest that after this you try to concentrate on the statement when it is made.

Q. When did you first start construction of the Midfield Building in Olympia?

A. April 7th, 1945.

Q. Was that contract oral or in writing?

A. It was an oral contract.

Q. What was the nature of the building?

A. It was built for a cannery, for processing frozen foods, or a cold storage cannery—whatever you want to call it.

Q. What was the agreed price of that building?

A. In excess of Two Hundred Thousand Dollars.

Q. What sort of a concern was the Midfield Packers, a [24] partnership, corporation or individual?

A. A partnership.

(Testimony of A. G. Homann.)

Q. Did that concern become involved in financial difficulties, and if so, when?

A. In the fall of 1945.

Q. When did you quit work on that building before the institution of the lien proceedings?

A. Less than ninety days before. We stopped it in the fall except enough to keep my lien alive, hoping they would pay. In the fall of 1945, I believe.

Q. And what did you do with respect to preserving your investment in that?

A. Filed a lien.

Q. Do you remember approximately when your lien was filed?

A. I looked it up and wrote it down in this little memorandum. If I can look at it—1946, I believe.

Q. You may refresh your recollection from any memorandum you have.

A. I don't have that. I started the foreclosure in November, 1946—when the lien was filed I cannot answer.

Q. When did you start your foreclosure?

A. In November, 1946.

Q. And for what amount?

A. A little less than Fifty Thousand Dollars, I [25] believe.

Mr. Butler: I move to strike. I don't think the witness is prepared to testify on these matters. He does not remember.

The Court: If you want to object to that the time to do that is when the question is asked. It was perfectly obvious what the answer would be.

(Testimony of A. G. Homann.)

Q. Did you complete that foreclosure?

A. Yes, sir.

Q. Who became the purchaser of the property at foreclosure sale? A. I did, myself.

Q. Do you remember when you acquired title to that Midfield Building?

A. In 1951—in March of 1951, I believe.

Q. At what stage of completion was the building when you acquired title to it by foreclosure?

A. Part of the foundation was in, the footings, and part of the outside wall where the steel trusses could be put on. That is the point where we quit work and where it was when I received title.

Q. Did you subsequently complete it?

A. Yes, sir.

Q. When, approximately?

A. I started work on it in 1952—no, no— [26] shortly after I received title. I have had it around two years.

Q. How much did it cost to complete construction of that building?

A. Around Ninety-six Thousand Dollars.

Q. Did you complete construction of the building? A. Yes, sir.

Q. Who owns the building now? A. I do.

Q. What use is made of the building?

A. The first floor is rented to the Olympia Brewing Company.

Q. At what rental? A. \$1,250 a month.

Q. Is any other portion of the building rented?

A. The upstairs part of the building that was

(Testimony of A. G. Homann.)

originally to be an office is rented to the State of Washington.

Q. At what rental? A. \$450 a month.

Q. When you changed your plan, your purpose, in holding the Sunnyside houses, what was the reason for your change?

A. Because I got into this mess with the Midfield Packers and my working capital was all tied up. I either had to liquidate or go out of business. The bank took my credit away from me and would not loan me any more and instructed me to pay back what I owed them. [27]

Q. In 1944 what was the extent of your bank indebtedness?

A. In May, 1944, I had \$45,000 borrowed from the National Bank of Commerce in Olympia.

Q. Prior to the time you acquired title by foreclosure to the Midfield Building in 1951 was it possible for you to either sell or borrow on the property?

A. I had nothing to sell or borrow on. It was merely a lawsuit that I hoped to receive title to.

Q. Who conducted that foreclosure for you?

A. Mr. Harry Ellsworth Foster.

Q. Did you ever have a real estate broker's license? A. No, sir.

Q. Were there written leases on the houses in Sunnyside, or under what circumstances were those houses rented?

A. They were rented month to month. There were no leases or signs on them.

(Testimony of A. G. Homann.)

Q. Did you ever extend to anyone an option to purchase any of the houses? A. No, sir.

Q. Did you ever make any changes in the houses to facilitate their sale?

A. There were never any changes to facilitate a sale. When a renter came in and went out we cleaned it out to make it ready for the next [28] renter.

Q. After the houses were completed what, if any, employee did you retain at Sunnyside?

A. I retained Harry Beckwith to represent me and listen to the complaints of the renters.

Q. Anyone else?

A. No; not in my employ. Horace Miller was the agent that handled the money for me and remitted the money to me.

Q. Who signed the deeds to the property?

A. Myself and my wife.

Q. Did anyone ever have any power of attorney to sign any deeds for you? A. No, sir.

The Court: We will take a ten-minute recess.

(Recess 11:11 a.m. to 11:21 a.m.)

Mr. Foster: If it please the Court, the decision of the supreme court in the Midfield case is in 38 Wash., 2nd, 1950; 228 Pac. Cir. 666.

The Court: Would counsel agree that is the proceeding to which the witness has been testifying?

Mr. Butler: Yes, your Honor.

Q. In addition to the building did that have any appurtenances? I refer particularly to a railway spur.

(Testimony of A. G. Homann.)

A. It had a railway spur coming in there in front of the building.

Q. That likewise was involved in the action? [29]

A. Yes, sir.

Q. And the judgment in that action was that it was spur to all of them? A. Yes.

Q. Now, will you describe to the court the circumstances about the furnaces? What was the matter with them?

A. The furnaces—it was a furnace that I was going to say was concocted in World War II to act as a furnace. It was not much more than a box stove that they burned coal in. It was not originally designed for coal and consequently would smoke and that would darken the paint in the room, as well as the furnishings in the house.

Q. From whom did you buy those furnaces?

A. I cannot tell you his name.

Mr. Foster: May I lead the witness?

Mr. Butler: I think this is immaterial. I don't have any objection.

Q. Was it the University Sheet Metal Works?

A. Yes.

Q. What disposition was made of the furnaces? What did you do with them, leave them in the houses or take them out?

A. We removed them from the houses and stacked them up along the alley and they were later sold to a junk man.

Q. Did any of those furnaces remain? [30]

A. Not to my knowledge, sir.

(Testimony of A. G. Homann.)

junk? A. No, sir.

Q. Do you remember as to whether or not you originally equipped the houses with ranges and refrigerators?

A. Yes, we did. We equipped each one with a range and a refrigerator.

Q. What was done with reference to the cost of those ranges and refrigerators with respect to the price of the houses for either rental or sale?

Mr. Butler: Object.

A. They were included in there.

Mr. Butler: Object, on the ground that this petitioner did not keep the books and I don't think he can testify from his own knowledge. Therefore, I don't think he is qualified to give this particular testimony.

Mr. Foster: Here is the owner of the houses and I am asking him with respect to the dealing with his own property.

Mr. Butler: I am sure they show how these were rented. I don't think the witness is qualified.

The Court: I think there is an ambiguity. Can you not withdraw the question and ask another? Do you mean as a bookkeeping matter?

Mr. Foster: Yes. [31]

Q. How were the prices of the houses computed with respect to the presence or absence of the range or refrigerator?

A. The house was priced with range and refrigerator.

Q. Did that apply to both sale and rental?

(Testimony of A. G. Homann.)

A. Yes.

Q. When the range or refrigerator, or both, was removed what happened to the original price you set on the property?

A. We deducted the amount of the range and refrigerator from it.

Q. Did you remove some ranges and refrigerators? A. Yes, sir.

Q. Under what circumstances and why?

A. Either the renter or the buyer had their own and would not wish to have ours in there.

Q. What disposition was made of those items after their removal?

A. We sold them secondhand to whoever might want to buy them.

Q. Were you ever or are you now engaged in the sale of such items? A. No, sir.

Q. Are you familiar with the street contract with the City of Sunnyside as reflected in one of these items, [32] "Sunnyside Miscellaneous Income"?

A. Yes.

Q. Explain.

A. This street was one of the main streets entering through the project and the Town of Sunnyside let a contract for this street to be improved. This contractor failed to fulfill the contract and that left us wallowing through mud trying to get to our project. We agreed with the city to go ahead and fulfill the contract so we could use the street to transfer our material and equipment in to our houses.

(Testimony of A. G. Homann.)

Q. Was that contract in writing or oral?

A. I believe it was oral other than we assumed the original contract.

Q. When did you finish that work?

A. In 1945.

Q. When were you paid for it?

A. I was not paid until 1946.

Q. On what system of accounting and reporting of income were you in 1944? A. Accruable.

Q. And were you in 1945 and 1946?

A. Yes, sir.

Q. And still are? A. Yes. [33]

Q. And always have been? A. Yes.

Q. Did you ever put any "For Sale" signs on these houses? A. No, sir.

Mr. Foster: That is all.

Cross-Examination

By Mr. Butler:

Q. I want to first go back to how this project originated. As I understand you found out about this project from the Hanford people?

A. I found out about it in the F.H.A. office in Seattle.

Q. Then you went up to Sunnyside?

A. I went up to Sunnyside and talked—they had a committee who were supposed to see they got the houses. I went with Ed Funk, the attorney for the city, over to the project and talked to Colonel Mathias.

(Testimony of A. G. Homann.)

Q. What were you told about the restrictions?

A. That I could only rent or sell—if an employee wanted to buy he had a right to, but I was restricted to the Hanford employees.

Q. You testified that you purchased the land?

A. Yes.

Q. As I understand, and correct me if I am wrong, you [34] borrowed money from the bank for this project?

A. I had from the bank at all times a loan running from twenty to eighty thousand dollars, depending on the amount of contracts I had. I never did get square with them for years.

Q. Is it not a fact when this project originated there was \$450,000—

A. Through Sherrill & Roberts, the lending agency for the project.

Q. And as your books show that was around \$450,000? A. Yes.

Q. During the time of this project, from the time you started it until the time you ended it your own investment would be approximately what, in the houses?

A. My own investment varied throughout. At the end of the project I had somewhere close to \$60,000.

Q. Is it not a fact that at the beginning of the project you had somewhere near \$20,000 in it?

A. The price of the land.

Q. Your own personal investment fluctuated be-

(Testimony of A. G. Homann.)

cause some of the houses were being sold and rented?

A. No; I bought the land and paid for labor and material up to the point where the houses could get a partial payment from the loan company.

Q. Were these houses built under the [35] F.H.A.? A. Yes.

Q. The F.H.A. guaranteed your loans up to around ninety per cent of the appraised value?

A. What do you mean, "guaranteed," or what do you mean?

Q. Did the F.H.A.—

A. They said how much we could borrow, yes.

Q. Did they guarantee up to about ninety per cent of the appraised value?

A. You say "guarantee." The F.H.A. didn't guarantee anything. They would allow us to borrow up to a certain amount if we could find a man to loan it.

Q. Do you have any documentary evidence in court on any of your dealings with the F.H.A.?

A. No, I don't.

Q. You signed some contracts with them?

A. We signed this house deal, yes.

Q. You don't have any documentary evidence?

A. I am sorry. There is none to be found. I will tell you where it is if you want to know.

Mr. Foster: I forgot something in the case in chief. May I interrupt? He moved and all records have been lost or destroyed.

Q. (By Mr. Butler): You don't know then

(Testimony of A. G. Homann.)

under what title of the F.H.A. [36] they were made?

A. I don't know. I would say 6 but I am not sure.

Q. You say Title 6?

A. I would not say but that is the only thing that comes to my mind.

Q. Did you have any written contract with the Hanford people? A. No, sir.

Q. It was all oral? Is that right?

A. Not entirely. All correspondence, etc., on the deal was handled through Ed Funk, city attorney, and I employed him as my attorney and paid him some twenty-five hundred dollars for so doing. He had all the correspondence in his office and after his term expired he left the office and I have not been able to find it since. He has a lot of valuable records of mine that would prove a lot of things I would like to find here.

Q. Did you make a search for Mr. Funk?

A. Yes; an extensive one.

Q. Did you go to his office in Olympia?

A. His office was in Sunnyside.

Q. Did you go to his former office?

A. Yes.

Q. And you were unable to find where he had gone?

A. The city attorney there then said Mr. Funk took [37] all records pertaining to this with him.

Q. Did you check with the attorney's records?

A. I just said I checked with the city attorney—I cannot give his name—and he said when Mr. Funk left he took all his records with him.

(Testimony of A. G. Homann.)

Q. When did you have this discussion?

A. At the start of the job and throughout the job.

Q. I am talking about recently.

A. No; I have not inquired recently.

Q. You had an agreement with the Hanford people to build these eighty-five houses?

A. That is right.

Q. The restrictions were you could only rent or sell to the Hanford people?

A. That is right. I don't think there was any mention of selling. We could rent to them but I assume if they wanted to buy——

Q. Do you know for sure that there was no mention of selling? A. I don't believe there was.

Q. Can you testify to this court—can you say for certain that there was no mention you could sell these houses?

A. If I could tell what is in my mind I would say yes, but I don't like to say. If I had these letters, etc., I [38] could say.

Q. These restrictions were lifted in 1944?

A. Either late in 1944 or early in the spring of 1945. I could not tell you which.

Q. You stated on direct examination that you had built these houses to rent or to sell to the employees of the Hanford project? A. Yes.

Q. And that before it was completed the restrictions were lifted and you then decided to continue with the building and you had a radio show, or a radio advertising program, for a period of two months. Now, in that radio program, or whatever

(Testimony of A. G. Homann.)

advertising was done on the radio, did you mention selling the houses? A. No, sir.

Q. What did you say?

A. We described the houses and where they were located and that they were for rent.

Q. You were under some renting restrictions at that time? A. That is right, as far as price.

Q. There is no change in those renting restrictions after the Hanford people decided to move out? You were still under restrictions?

A. Under rent control. [39]

Q. So it didn't make any difference who you rented to? If you rented to the employees from Hanford you would have gotten the same rent from the Hanford people as you got from other people? Is that not correct? A. That is right.

Q. Did you, at that time, when these restrictions were lifted and you had this radio program—did you employ Horace Miller to work for you?

A. No; not to work for me. I gave him the handling of the money that came from the rent or sale to remit to me.

Q. Is Mr. Miller a real estate agent?

A. Yes.

Q. Did you make an agreement with him to pay a certain percentage of everything he would sell?

A. I agreed he would have five per cent on the rent for collecting and sending me the money. Also on any sales made he would have two per cent—two and a half per cent.

(Testimony of A. G. Homann.)

Q. Is it not true that the usual fee for real estate agents for selling houses is five per cent?

A. That is true.

Q. Is it not true that you only gave him two and a half per cent and that Mr. Beckwith was also engaged there and you were going to give him two and a half per cent for the sale of each house?

A. No. [40]

Q. Didn't he get two and a half per cent?

A. No.

Q. He never got any commission?

A. No; only weekly wages.

Q. And you are saying he never received anything for his participation for the sales in the houses?

A. No, sir.

Q. You testified on direct examination that you didn't have any leases on these houses. Is that correct?

A. No written leases.

Q. But you did have agreements?

A. You would have to define what you mean by "agreements."

Q. You testified it was on a month-to-month basis?

A. That is right.

Q. Do you remember a conversation with me in my office concerning——

A. I think I know what you are referring to and will answer in my own way if you will let me.

Q. I will ask and then you can answer. You do remember a conversation in my office?

A. Several of them, sir.

(Testimony of A. G. Homann.)

Q. The one in particular pertaining to whether or not there were leases on this property?

A. I don't remember anything being said that there were leases on the property. [41]

Q. You don't remember telling me in my office that you didn't know whether there were any leases or not?

A. If there was any lease it was not given by me and no one else had power to do so. If there were any agreements—some of the renters came in and said at the time they rented if their job held out and they liked it here they would like to buy but didn't want to buy—you know when you come to a new country you kinda like to see what it is like, and some of them we told if they did want to buy we would carry the rent, that is, credit the rent to the purchase price of the house. That is the only thing we did down there that I remember. I knew what you wanted.

Q. Mr. Miller was hired right after you found that the Hanford people were not going to be available for occupancy?

A. That is right, sir.

Q. Did Mr. Miller have authority to sell some of these houses if he found a buyer?

A. There were some houses sold so there is not much doubt I told him not to.

Q. So we can infer from that that he did have permission to sell?

A. He did have permission to sell with my approval, yes, of the individual sales.

Q. Do you know of your own knowledge how

(Testimony of A. G. Homann.)

much activity [42] Mr. Miller pursued by way of selling these houses. Do you know of your own knowledge whether he posted signs or took ads in the paper, or had signs in his office?

A. There were no signs posted on the job and if there were any advertisements in the paper I have never seen them and I don't believe there was.

Q. You would not say there was not?

A. I would not say but I have never seen it or heard of it.

Q. But there is the probability that since he had permission to go ahead that he from time to time contacted clients of his own?

A. There were sales made. I don't know how he contacted them. The people came and tried to buy after they had lived there for some time and had employment there and things started to pick up. You could have sold them a dozen times.

Q. You say you are in the general contracting business and have been in it for thirty years?

A. Yes.

Q. You built buildings before you built these houses?

A. I built many buildings.

Q. And did you sell them?

A. No, sir.

Q. You never built a building that you [43] sold?

A. Yes; I built a home for myself that was sold.

Q. How did you handle these construction contracts? Did you contract with someone and build a house or building and then they would sell it?

(Testimony of A. G. Homann.)

A. As far as house building is concerned, since 1926 I have never built no houses.

Q. I am talking about buildings you built.

A. Most of my work is done by bidding on a job with other competitive builders and when I am low builder I build on contract. That is ninety-nine per cent of my jobs.

Q. You build on contract for another builder?

A. No, for the owner.

Q. What associations do you belong to?

A. Associated General Contractors of America, Tacoma Chapter.

Q. Any others?

A. Not in the building line. I belong to other things but not in the building line.

Q. We were talking earlier of this F.H.A. so-called Title 6. Did that impose any restrictions on you as to selling or renting the property?

A. I am not saying it is Title 6—I don't know. They had so many titles during the war and there were so many different projects. Most of them, I think, allow [44] up to twenty per cent sale and the balance can be rented.

Q. Had all the houses been completed by the time you found the Hanford people would not be available? A. Yes, sir.

Q. They had all been completed?

A. The houses, yes, but we put in the lawns and trees, and shrubs, etc. That came in the spring after it was dry enough to work the ground, etc.

Q. Do you know of your own knowledge and for

(Testimony of A. G. Homann.)

sure whether the F.H.A. fixes the location and size of the house and the type and number of the rooms?

A. When you have a F.H.A. project you submit a plat, showing the site of the land and the location. They inspect it. You submit a plat of the house and they approve or disapprove it. If they approve you build it and if they don't approve you don't build it.

Q. These were all single dwellings?

A. Yes, and all approved.

Q. From the time you completed the houses until they were all sold is it not true the cost of maintenance and upkeep were rising swiftly and it was costing you more to keep the houses, per house?

A. Nothing during the time of owning the houses was raised. I had one man employed. He took care of it. I didn't pay any more wages. It might be a gallon of paint [45] cost a little bit more, but it was a very small amount.

Q. How long would you say this radio campaign was conducted?

A. I paid two different months for it so it was two months at the same amount.

Q. Who handled it for you?

A. Harry Beckwith.

Q. Did you approve the plan? A. Yes.

Q. You testified that all the houses were rented before any were sold. Is that a correct statement? Refresh your memory?

A. I don't have to look at the record. I have nothing here to refresh on.

Q. Was any effort made at all on your part, or

(Testimony of A. G. Homann.)

on the part of any of your agents, including Mr. Beckwith, to keep the houses in constant repair? You fixed them up from time to time?

A. The only thing done in repairing the houses was if kids would dirty up the walls and smear them up and then we would give them another coat of paint and clean them up.

Q. You testified on direct examination that you did nothing to improve the marketability of the houses?

A. No more than after renting a house if one renter goes out and another comes in. You always do that. [46]

Q. That is what I am getting at. Since they were new houses and were fairly new all along, there was not much to do?

A. No maintenance except once in awhile the kids would dirty up the walls and we would clean it and paint it up again.

Q. What were Mr. Beckwith's duties there?

A. Looking after my interest in these homes.

Q. Do you know how much activity he conducted on behalf of selling these houses? Do you know that of your own knowledge?

A. No, sir.

Q. You testified about the furnaces. These were the original furnaces that were installed in the houses?

A. The ones in there that we took out?

Q. Yes. A. Yes, the originals.

Q. You took these out and put new ones in?

(Testimony of A. G. Homann.)

A. We took them out and put in oil burning furnaces.

Q. With regard to this street contract, as I understand, you actually took this work over and performed it in the year 1945? A. That is right.

Q. The contract itself was on a street that had bogged down your project? [47]

A. It was a street that the City of Sunnyside had let to improve and during the course of the improvement they had cut the top off and left the mud. We could not get through with our trucks and equipment. When he threw it up we agreed with the city that we would complete the contract for the amount of money he had left.

Q. When did you agree with the city on that?

A. I imagine a couple months before that was inspected.

Q. When was that inspected? I will refresh your memory. Was it October 10th, 1945?

A. I believe that was right. It was within a day or so of the time we completed it.

Q. Did they tell you at that time that you would be recompensated for that?

A. This contractor had quit and my office informed me that the road was impassable. I went up there and went with Harry Beckwith and Ray Lensen to the street commissioner and told them the shape we were in. They told me there was no money left to pay for it in the year 1945 so there was nothing he could do until their new appropriation came in. The money was all spent. We told them we

(Testimony of A. G. Homann.)

simply could not continue our project, could not get our supplies in with that kind of a street, so they said, "You fix the street and we will pay you." So we finally agreed that we would go ahead and finish it out and as soon as the [48] appropriation came in they would pay me, which they did.

Q. That was in '45, or was it '46?

A. No, in '45.

Mr. Foster: It was paid in 1946.

Q. Was it agreed on at the time you talked to these people how much you would receive for this street contract?

A. As far as them paying me it would be just the balance that they would have had to pay the other contractor if he had completed it.

Q. So the amount was not agreed on until after the job was completed?

A. No, the amount was agreed on according to the other man's contract.

Q. Will you give that again?

A. We agreed to do it at so much per yard for unit excavation, so much for base rock, and so much for sand rock that went on top of the surfacing.

Q. You testified that you built these houses for the occupancy of the people from the Hanford project and that you expected to rent to them, that your rent would be under the rent ceiling of some kind, rent restrictions. Then you testified that this changed. You found that the people were not going to be available for renting and you said your purpose changed. Is that correct?

(Testimony of A. G. Homann.)

A. The purpose—I don't know what you mean by "purpose." [49]

Q. Well, your purpose in building was to rent?

A. We built for the Hanford Engineering Works.

Q. Didn't you testify on direct examination that your purpose changed?

A. Well, the original intention changed because there was no more Hanford Engineering Works to deal with.

Q. What did it change to?

A. Well, it forced us to go out and find who we could to rent to.

Q. And how about to buy?

A. Well, it just seemed it changed from renting to buying when I got all my capital tied up on these two projects.

Q. When was this? A. Early in 1946.

Q. How many houses did you sell in 1946?

A. Sixteen.

Q. Then you had some intent to sell the houses in 1945?

A. Some of these people came in to rent and said they wanted to buy rather than rent.

Q. So you sold in 1945?

A. Sixteen houses.

Q. Did you sell any in 1944? A. No.

Q. Did you take any earnest money in 1944? [50]

A. In 1944 they had taken one deposit which we were told by the Hanford Engineering Works we could not do and so it did not go through.

(Testimony of A. G. Homann.)

Q. So you took one deposit?

A. I didn't take it myself. It was taken over there.

Q. Where? A. In Sunnyside.

Q. By whom?

A. Horace Miller. Any real estate man might take a deposit and ask if I would sell. That is what real estate men are in business for. They even try to buy property now that I don't want to sell.

Q. Did Horace Miller contact you about this house?

A. Either me or Mr. Beckwith. I could not tell you which way it was.

Q. Did you tell him to take a down payment?

A. No, I didn't.

Q. But he took it? A. Yes.

Q. Do you mean they merely took the down payment without consulting you at all?

A. If you are in the real estate business you know it is done time and time again. A person wants to buy a particular piece of property and I go see the owner——

Q. You mean I go uptown to a real estate agent and tell [51] him I want to buy the Federal Court House and I put down five dollars and he says "I will take the five dollars"?

A. I have gone myself and told them I want to buy such and such a piece of property, and tell how much I want to pay for it. He will go to the owner.

(Testimony of A. G. Homann.)

Q. Had you ever talked to Horace Miller before he took that down payment?

A. I have talked to Horace Miller many times.

Q. You talked to him apparently in 1944?

A. I talked to him before I ever started the project. He was one of the directors in the getting of these houses.

Q. Is he the only real estate agent in Sunnyside?

A. No, there are many of them.

Q. Had you told him he might act in your behalf in 1944?

A. When I talked to him I told him that when the project was over and rented and completed I had to have someone represent me and send the money to me and that I wanted him to do that when the time came.

Q. So he had reason to believe that he was acting on your behalf? Is that a correct statement?

A. I imagine he had reason to believe he would be the one to act for me and on my behalf if anyone could.

Q. When is the first day you found out the Hanford people would not be available? [52]

A. I testified that it was either late in 1944 or early in 1945 and that is the best I can tell you, sir.

Q. You don't know the exact date?

A. No.

Q. The people who bought their houses in 1945 were under a so-called option to buy? You had an agreement with them if they paid their rent and

(Testimony of A. G. Homann.)

subsequently wanted to buy the house you would take the rent and apply it on the purchase price?

A. Not unless the people came to me and wanted to buy.

Q. But you did have some of these agreements?

A. A few, like I told you, if they were renting and wanted to buy.

Q. Can you testify from your own recollection how many of your houses were sold before they were rented?

A. I could not testify that there were any.

Q. Is it not a fact that some of the houses were never rented?

A. Well, I would have to look at the record to find that out. I could not tell you here. I carry on a large business and ninety-nine per cent of my time is taken up in my contract jobs and that is like many other things. However, Harry Beckwith is over there to represent me and after the construction part was done I very seldom went over there or gave it much thought. [53]

Q. You didn't pay too much attention to it? It was all in Mr. Beckwith's hands?

A. After the project was completed and we decided to go ahead and rent the houses, that is right. I was busy making money to keep the operation going.

Q. Did you go over there occasionally, to the houses? A. Yes.

Q. How often did you go?

(Testimony of A. G. Homann.)

A. Well, during construction I went over, I believe, every week.

Q. After the houses were completed?

A. I doubt if I got over there once in four months.

Q. Then how could you testify that there were not any "For Sale" signs on the property?

A. I didn't see any "For Sale" signs and I never paid for any.

Q. You don't know then from your own knowledge how much activity Mr. Beckwith conducted?

A. I am sure Mr. Beckwith would not disregard my orders not to put up "For Sale" signs.

Q. Did you give him orders not to?

A. Yes.

Q. What was the reason for that?

A. I didn't want them there.

Q. Why didn't you want them there? [54]

A. When I started the thing we were only going to rent and after I got in they would still be rented.

Q. You sold sixteen houses in 1945?

A. Yes.

Q. At that time you decided to sell the houses?

A. That is right. People came there and wanted places. They have to live there and have their jobs there. What are you going to do, say "No, I won't give it to you"?

Q. Why not put up for sale signs?

A. Because I didn't have enough for general sale.

(Testimony of A. G. Homann.)

Q. You told Mr. Beckwith not to put up "For Sale" signs? A. That is right.

Q. When did you tell him that?

A. Right at the start.

Q. At the beginning?

A. Yes, when the houses were finished.

Q. But you don't know of your own knowledge, if you only visited the houses once in four months or so—you don't know of your own knowledge there were not some of those signs around the houses from time to time?

A. I told you I didn't authorize any, I never seen any, and I don't believe there ever was any. Mr. Beckwith can answer that question.

Q. Do you know of your own knowledge, Mr. Homann, how [55] you reported the income tax from the sales in 1945?

A. I paid one hundred per cent——

Mr. Foster: The income tax returns are in evidence.

A. I can answer your question another way. My understanding is that on a long-time gain you have to hold your property six months or longer before you can take that and these first houses were on the margin where there might be some question where it might be over six months. That is why there is no capital gain in 1945.

Q. I show you your individual tax return and ask you who made that out?

A. Frank Kinsey.

Q. Did Mr. Kinsey make out all your income tax returns? A. He did at that time, yes.

(Testimony of A. G. Homann.)

Q. Did you have a discussion with Mr. Kinsey as to how to incorporate these houses in any of the years? A. Well——

Q. How they were to be handled on the income tax return?

A. You mean on the second year sales?

Q. On all the sales.

A. I never gave any account how to do anything except what the books showed and the facts were.

Q. Did you have any discussion with Mr. Kinsey concerning these income tax returns? [56]

A. I don't know what you mean.

Q. Did he call you down when you signed the returns and talk to you about them?

A. He showed me the income tax returns.

Q. Did you have considerable confidence in him?

A. I had considerable confidence in the court at that time.

Q. Did you think he would incorporate everything you should pay?

A. That is right. I always insisted if there was any question that I would rather pay more than not enough. I always said "Whatever you do, don't make it short."

Q. I have here the 1946 income tax return of your wife, Mrs. Homann. As I understand, these returns were all made by Mr. Kinsey and you have testified you had a lot of confidence in him and never questioned him. I am going to ask you if Betty Griggs was claimed as a dependent on your 1946 income tax return? A. Yes.

(Testimony of A. G. Homann.)

Q. And that she was adopted——

A. I don't know how that got there.

Q. That is Exhibits 2b and 3c. Was she adopted?

A. No.

Q. Is Homann her name? A. No. [57]

Mr. Butler: I have no further questions.

A. I would have liked to answer him.

Mr. Butler: I would like to keep the record straight.

A. I have taken nine kids and put them through high school and gave them an education and put them out in the world and got them jobs, and the way that came about is Mr. Kinsey said "You should be entitled to her as a dependent." I have had nine kids and still have them and have some coming. I do that instead of going to church.

Mr. Butler: I didn't have any other purpose except to bring out that the man who handled your income tax reports was rather shady in the way he handled the thing. Believe me, Mr. Homann, that was my only purpose. If the government had for one moment thought you had taken that claimed dependent without disclosing the facts they would have claimed fraud but they don't think that.

The Witness: Mr. Kinsey would still be with me if I had not found out he made too many notations and didn't do as he was paid to do. He kept the records in Tacoma and I never got to see them.

Redirect Examination

By Mr. Foster:

Q. When did you release Mr. Kinsey?

(Testimony of A. G. Homann.)

A. When I went to Tacoma to get the books he was [58] supposed to make on Sunnyside and found he had not done so, that he had promised month after month, and at that time I employed Mr. Stickney as my accountant.

Q. Where was your office in 1945, 1946 and 1947?

A. 112 North Franklin.

Q. Olympia? A. Yes.

Q. Is it there now? A. No.

Q. Where is it now?

A. Lacey, Washington.

Q. When did you move it?

A. About 1949, I believe, sir.

Q. Have you looked for additional records in this case? A. Yes.

Q. Have you been able to find them?

A. No, sir.

Q. Did you give Mr. Kinsey any records that you do not now have?

A. I gave Mr. Kinsey many records that he at that time had on this particular project.

Q. Were you able to get them back?

A. Not all of them.

Q. Are you able to describe those that are missing?

A. The individual cards that gave a complete description [59] of each and every one of these houses. It was prepared by Mr. Miller.

Q. When did you last see Mr. Miller, Mr. Horace L. Miller?

A. It seems to me about a year ago.

(Testimony of A. G. Homann.)

Q. And under what circumstances?

A. We went there to see him to see if he had duplicates of the cards he had given me that were given to Mr. Kinsey.

Q. Who went with you on that occasion?

A. Mr. Harry Ellsworth Foster and Mr. Stickney.

Q. What was Mr. Miller's physical condition?

A. He had had a stroke of paralysis. He could not walk and was barely able to talk.

Q. Was he able to testify orally or by deposition?
A. I would say not, sir.

Q. Was he able to carry on a coherent conversation?
A. No, sir.

Q. Has his condition changed any recently?

A. I have not seen him since but hear he is worse.

Q. When you started this project how much land did you buy?

A. We made eighty-five lots out of it. I imagine we bought one hundred lots, at least. The F.H.A. requirements were that they be not less than sixty feet wide.

Q. Who is Ed Funk? [60]

A. He was city attorney of Sunnyside and head of this committee who were getting the houses for Sunnyside. I employed him at that time as my attorney to take care of the correspondence with the Hanford Engineering Works and any other correspondence I wanted taken care of.

Q. Do you know where he is now?

(Testimony of A. G. Homann.)

A. I do not, sir.

Q. When did he cease to be in your employ?

A. About the time the houses were finished.

Q. After that was there some litigation between you? A. Yes.

Q. Do you know where he is now?

A. No, sir.

Mr. Butler: I object to this line of questioning.

Mr. Foster: I want to show that this witness is not available.

The Court: It is repetitions. He already testified to it.

Mr. Foster: Very well, I will withdraw it.

Q. The earnest money that was received in 1944, Mr. Homann, that Mr. Butler characterized as a "down payment," was that returned or did you keep it?

A. To the best of my knowledge it was returned.

Mr. Butler: I move to strike. If he doesn't remember I don't think it should be in the record. He [61] would have to show he would have that knowledge and I don't believe he has and I will move to strike.

The Court: It will be stricken.

Q. Have you ever, since these houses were built, or before that, built any houses for sale on your own account? A. No, sir.

Q. In the year 1946 what was your purpose in renting these houses?

A. The contracting business is a very uncertain business and I have a large family that I work hard

(Testimony of A. G. Homann.)

to support and I am always looking for some place to get an income with which to support that family in case of my death, and that is the reason why I wanted to keep the houses, for that purpose.

Mr. Foster: That is all.

Mr. Butler: I have no further questions.

The Court: I have one or two questions.

Q. I understood you to say you had instructed Mr. Beckwith not to put any "For Sale" signs on the property? A. That is right.

Q. I also understood you to say that probably this man, Miller, or his organization, took a down payment, or earnest money payment, on one house the year before?

A. Well, honestly, between you and I, I cannot tell you much about it but I do know that someone tried to buy and we [62] were not to rent to anyone except Hanford employees and I know it didn't go through.

Q. I understood you to say a real estate agent might come in voluntarily in a situation like that even without being instructed?

A. That is right.

Q. Have you any way of knowing whether or not Mr. Miller put any "For Sale" signs on that property when you were not there?

A. I have never seen any sign on the property when I went there.

Q. I understood you to say there was a period of as much as four months when you were not there?

A. I think between the time the houses were completed and the final deal made there might have

(Testimony of A. G. Homann.)

been as much as three or four months when I may not have seen it.

The Court: I have nothing further.

Mr. Butler: I would like to ask a further question, if I may.

Q. Mr. Homann, it is true, is it not, that after these houses were completed you didn't have any trouble renting them? They were all rented?

A. At the start there was, but there was a lot of shortage of houses in the Yakima Valley and that is the reason we put the advertising program on. [63]

Q. But that was the first two months when you found that the Hanford people were not available?

A. When we found it would be hopeless if we didn't do something.

Q. When you found the Hanford people would not be available you contacted the radio?

A. That is right.

Q. After that you had no trouble renting the houses? A. I had them all full.

Q. There would be no reason for having "For Sale" signs on them? A. I guess not.

Mr. Butler: That is all.

Redirect Examination

By Mr. Foster:

Q. Did you ever see a rented house with a "For Sale" sign on it? A. I don't—

Mr. Foster: I will withdraw that question.

(Court adjourned 12:20 p.m., October 21, 1953.)

October 21, 1953—2:00 P.M.

HARRY G. BECKWITH

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified [64] as follows:

The Clerk: State your name, please.

The Witness: Harry G. Beckwith.

Direct Examination

By Mr. Foster:

Q. Mr. Beckwith, where do you live?

A. Sunnyside, Washington.

Q. Are you employed by the petitioner, Mr. A. Homann?

A. No, sir.

Q. Were you employed at one time by him?

A. I was employed in 1941 until about 1949—I guess eight or nine years.

Q. Since then have you been employed by him?

A. No.

Q. In what capacity were you employed by Mr. Homann?

A. Well, as assistant in helping—assistant in McChord Field, and in Sunnyside it was in charge of these houses. He was a long way away and I had charge of these houses and also I was looking after new business there, to acquire new business.

Q. When were the houses completed?

A. 1945.

(Testimony of Harry G. Beckwith.)

Q. Can you tell us approximately when?

A. No, it would be toward the end of the year.

Q. When was the change made with respect to the Hanford [65] occupying these houses?

A. It was late in 1944 or early in 1945.

Q. How was that change communicated to you?

A. Colonel Mathias came down in uniform and said, "Well, boys, the project is yours. We don't need it anymore."

Q. What else was said?

A. "The people we expected to come here we are moving to Oake Ridge, Tennessee."

Q. Were they moved?

A. The next Sunday night. A car came along and moved them out. They were living in the federal project up in Sunnyside.

Q. How did the radio program on the radio start?

A. Well——

Q. When did it start?

A. Along about June or July, 1945.

Q. Who had charge of that advertising?

A. I did.

Q. Will you describe it to the court?

A. It simply described the houses and the availability of the houses for rent in that district. With the Hanford project out of the way we didn't know where we were going to get anyone to rent because in moving the Hanford people out of the community perhaps the whole thing was going to be moved. The army does that many times. [66]

Q. What radio was that?

(Testimony of Harry G. Beckwith.)

A. KIT, Yakima.

Q. Did they have a name for the announcement of the program you carried on that radio?

A. Did they have a name?

Q. Yes. A. I don't understand.

Q. What was the name of it? Did you have a program?

A. It was just a spot announcement.

Q. During what months did the spot announcement appear on the radio station?

A. I would say June, July, and possibly August, 1945.

Q. What was the response to it?

A. It was very good. It saved our lives, in fact.

Q. Was that ever renewed? A. No.

Q. Did you ever have any radio campaign to sell those houses, or any advertising campaign for that purpose? A. No.

Q. Did you ever display any "For Sale" signs on the houses? A. No.

Q. Do you know whether or not Mr. Miller carried any newspaper advertisements on them?

A. I don't recollect any newspaper advertising being [67] carried there. I didn't need to because the G.I.'s were coming along about that time and beginning to inquire about their ability to get in the houses.

Mr. Butler: I move to strike because it is not responsive and also because he says he thinks. He didn't seem to have any first-hand knowledge. It may be he didn't see any but the inference is Mr.

(Testimony of Harry G. Beckwith.)

Miller didn't conduct any campaign, but I don't think the witness can say for sure.

The Court: I will deny the motion.

Q. When did you last see Mr. Miller?

A. About two weeks ago.

Q. What is his present condition?

A. Very poor.

Q. Is he able to testify?

A. No, his memory is bad and it is with great difficulty that he moves about at all.

Q. How were the houses, the sales of the sixteen houses in 1945 made? Was that in response to anything in particular?

A. No, it was just a gradual dropping in of people who wanted to get houses.

Q. Volunteers? A. Volunteers.

Q. Did you occupy one house, one of these eighty-five [68] houses?

A. Yes, I occupied 901 - 10th Street—it was 801 10th.

Q. Was that house sold?

A. That house was sold.

Q. When? A. In 1947.

Q. At the end of the calendar year of 1946 how many houses remained unsold?

A. The one I lived in.

Mr. Butler: Objection. That is not reflected in the stipulated facts. The stipulation was that 801 remained and that 901 was sold.

Mr. Foster: Mr. Butler, we went over that very carefully.

(Testimony of Harry G. Beckwith.)

Mr. Butler: There is nothing in the record so far to show that is a resale. That is up to you. Our record shows the house was sold in 1947.

Mr. Foster: May I have the stipulation? On the second page. "In 1945 petitioner sold 16 houses. In 1946 petitioners claim to have sold 68 houses and in arriving at gain on the sale of the houses in 1946, petitioner has claimed the cost of the 68 houses. Petitioner now admits that one house remained unsold at the end of 1946. This house was located at 801-10th Street and was occupied by Mr. H. G. Beckwith. [69]

"The respondent herein contends that two houses were sold in 1947 and that their cost must not be used in computing the gain on the sale of houses in 1946. The Government's contention is partially predicated upon the following statement taken from a statement sent to petitioner by Horace L. Miller which was found in petitioner's records of a sale in 1947."

The Government contends that.

The Court: I don't think I quite understand your position, Mr. Butler.

Mr. Butler: It was my understanding and I will apologize if it was true that there was no doubt that two houses were sold in 1947, that is 801, the house occupied by Mr. Beckwith, and the sale of 901, taken from Mr. Miller's records. It is my position that petitioner conceded that two were sold in 1947.

The Court: He didn't concede that in this stipulation.

(Testimony of Harry G. Beckwith.)

Mr. Butler: No, I can see that now and I apologize.

Mr. Foster: In order there may be no misunderstanding may I have the Court's permission to ask that question?

The Court: You may.

Q. At the end of the calendar year of 1946 how many houses of the eighty-five remained unsold?

A. One. [70]

Q. Were there any written leases? A. No.

Q. On any of these houses? A. No.

Q. Now, in the calendar year of 1946 what effort was made to sell the sixty-eight houses?

A. There was no particular effort made to sell them. The people came around and wanted them. They came in of their own account.

Q. What compensation did you receive for your services from Mr. Homann?

A. I received a weekly wage.

Q. Did you receive a commission on the sale of the houses? A. No.

Q. Did you have any other functions, any other jobs over there for Mr. Homann besides the servicing of these houses?

A. Just to look for any new business that might be in the offing.

Q. Did you find any? A. Yes.

Q. How many jobs did you find?

A. We bid on two schools over there and got one.

Q. Was that a large or a small contract? [71]

A. That was about four hundred thousand dollars.

(Testimony of Harry G. Beckwith.)

Q. And you were employed there during that entire school construction period?

A. I was employed there during the school construction, yes.

Q. In what capacity?

A. Well, you might say mostly public relations.

Q. Are you familiar with the furnace situation in those houses? A. Very.

Q. Will you describe the original furnaces?

A. The original furnaces—first of all we had to get permission from the Hanford authorities to buy furnaces and those were purchased through the University Sheet Metal Company, some concern back in the east—in Pennsylvania, if I remember rightly, and they were converted furnaces. They had been used as oil furnaces and had to be converted into wood or coal burning because of the fact the government was not allowing you to have oil at that time. The furnaces, when they came, were installed in the buildings and about the first trouble we had was two fires and the fire department notified us that we better get rid of those or have all the houses burned down. Then of those that remained—it was rather cold weather at the time—the people didn't want them out or didn't want them to stay in because they were [72] smoking and endangering the buildings.

Q. What was done with reference to leaving the furnaces in or taking them out?

A. We had to take them out.

Q. How many were removed?

(Testimony of Harry G. Beckwith.)

A. All of them.

Q. What was done with them?

A. They were thrown in the back yard and used as incinerators mostly by the people around there. Everyone thought it was a great joke.

Q. Did you finally make some disposition of them?

A. We gave some of them away to people who wanted them for incinerators. The motors and fans were good but the rest were no good whatever.

Q. Was there some salvage?

A. A little salvage, not much.

Q. With reference to ranges and refrigerators—

A. The ranges and refrigerators—a number of people came in and had their own refrigerators and ranges and we had permission, or authority, rather, from the F.H.A. at that period to charge an extra price of rental on the ranges and refrigerators. They had their own so they wanted them taken out and did not want to pay that extra rental. We took them out and sold them as salvage, as second-hand ranges and refrigerators. [73]

Q. Was Mr. Homann ever engaged in the business of selling or buying refrigerators and ranges?

A. Not as long as I have been with him.

Q. What has been his business?

A. A general contractor, mostly working on big buildings. I joined him at McChord Field where we were building for the Government. We built the general run of buildings, various kinds of buildings,

(Testimony of Harry G. Beckwith.)

from fire halls and churches and houses for Negro troops, etc., that were used in the fort at that time.

Q. During the time you were employed by Mr. Homann did he ever build any houses on his own account for others? A. No.

Q. Was he ever engaged in the real estate business?

Mr. Butler: Objection. I don't think whether he was engaged in the real estate business or not is for this witness to say, and it is purely repetitious. It is his opinion what business Mr. Homann was in and that is the ultimate question for the Court. I don't think it is pertinent and object on that ground.

The Court: That is a fact. Whether or not these sales took place in the course of business is one of the questions I have to decide.

Mr. Foster: Yes.

The Court: And that depends on a number of things. [74]

Mr. Foster: Yes. Here is a man employed by Mr. Homann and in charge of that operation all during that time and he had been employed by Mr. Homann from 1941 until 1949.

The Court: Suppose he is of the opinion that Mr. Homann was not in the real estate business and I, on the basis of the record here, am of the opinion that he was?

Mr. Foster: That goes to the weight of his testimony.

The Court: I am sustaining the objection.

Mr. Foster: I offer to prove by this witness now on the stand that he was employed by Mr. Homann

(Testimony of Harry G. Beckwith.)

from 1941 to 1949 and that he was familiar with his business during all that time and that he never was engaged in the real estate business.

Mr. Butler: I renew my objection.

The Court: Your objection has already been sustained.

Q. At any time was any change made in any of these houses to facilitate the sale of the houses?

A. Not beyond the changing of the furnaces and that change was not in particular to facilitate the sale. It had to be changed anyway.

Mr. Foster: I have nothing further.

Cross-Examination

By Mr. Butler: [75]

Q. How long did you say you had been with Mr. Homann, since '42? A. Since 1941.

Q. What has been your general job with him?

A. I have been a kind of assistant to him, a close assistant, in all his work.

Q. In the McChord Field job that you mentioned, for instance, were you just a kind of general assistant in that you took care of certain details?

A. No, at McChord Field we started in pretty well from scratch and I did just about everything.

Q. I mean generally. You would take care of certain details that he as a general contractor in his work could not handle? A. Yes.

Q. You testified that some Army colonel came in to you and told you that it was all over, that they were moving the Hanford employees? Do you re-

(Testimony of Harry G. Beckwith.)

member the colonel's name? A. Mathias.

Q. What inquiries did you make of the colonel? Did you ask, for example, when they were leaving and why they were leaving?

A. He said they were leaving immediately and they left that Sunday night.

Q. So you didn't talk to him much about it? [76]

A. There was no talking about it. He just said "It is in your lap." I said "What are we going to do? We came here with the idea we were going to rent only to the Hanford people." He said, "Well, you can rent to anyone you want to now."

Q. You testified that you were in charge of the advertising program. Did you write the advertisements? A. Yes.

Q. In these advertisements, which I understand were spot announcements over the radio, did you say anywhere that you would not sell? A. No.

Q. You say the radio program took place over two months? A. Yes.

Q. It was not renewed? A. No.

Q. Is it not a fact that at that time it was not necessary to renew them?

A. We didn't need them. They were coming to us.

Q. That would go to the whole general picture, things were so good there didn't have to be any further program?

A. At that time the G.I.'s were coming to see if they could not have those houses. One would pass it on to another and bring their friends in.

Q. Do you know, of your own knowledge, on

(Testimony of Harry G. Beckwith.)

these sales [77] the person who took over the finances of the house, took over the so-called mortgage? A. They all took it over.

Q. They all took it over?

A. Eventually, yes. It took some time to get some of them passed.

Q. You were in court this morning and again this afternoon and heard us talking about selling campaigns where certain signs were placed on the property by you or by somebody else, and advertisements. Is it not a fact none of that would be necessary to sell the houses or rent them after these announcements?

A. No signs were put up there.

Q. Would it be necessary to put signs up?

A. I would not think so.

Q. Did you have any specific instructions from Mr. Homann in regard to how to conduct sales in regard to these sales? A. With each sale?

Q. With sales in general?

A. When I informed Mr. Homann of the Hanford result and that they were going to move their men Mr. Homann was real sick about it and didn't know what to do and it was a question then where we would go to get anyone to rent these houses. People around there live there or have houses [78] of their own and we figured we were really in a bad spot.

Q. Is it not a fact you were worried about either renting or selling? I don't mean to confuse you. I

(Testimony of Harry G. Beckwith.)

apologize. You were worried you say about renting but didn't you have any discussion about selling?

A. Not at the time because these houses were all under mortgage made by Mr. Homann and he had to make the payments on the mortgage. Unless we got someone in there in a hurry to start making payments he was done for.

Q. Could not the same thing be done by selling the houses and have the buyers pay?

A. It could be but at that particular time——

Q. Did you have any specific discussions on this point? A. Yes.

Q. Do you recall any of those discussions?

A. We talked about it continually. It was on his mind.

Q. But he didn't instruct you not to sell?

A. We didn't think it favorable at that time. The people renting figured the houses were too high and also the rent too high.

Q. So, if you could have sold them you would have?

A. I don't know what we would have done at that time.

Q. You testified that in 1945 the houses were sold, [79] most of them were volunteers. What did you mean by that?

A. I mean you didn't have to, or, we didn't have to, go out and find those people. They came to the office and to us.

Q. You did have a rental office?

A. The house I was in there. That was head-

(Testimony of Harry G. Beckwith.)

quarters for any trouble that came up in plumbing, or anything like that. Everyone came there.

Q. Did you and your wife live in that house?

A. No, I lived there by myself.

Mr. Butler: I am sorry.

Q. When did you work on this school? Do you remember that specifically? I didn't get the date.

A. I was working on the school in 1946, I think it was, that particular school there.

Q. Was that in Sunnyside?

A. In Sunnyside, yes, the Washington School.

Q. Did you live in the project at that time?

A. Yes.

Q. You were not gone all day on that job?

A. No, no.

Q. You conducted the business of that job in your office, or how?

A. Well, I would go around and visit the superintendent of schools and the different people around there that I [80] thought might be influential in helping it along.

Q. I misunderstood. It was my understanding you were actually building the house, but you were competing?

A. Yes, you have to bid. They had trouble with the bond issue and required some assistance in getting a new one, etc., and also in getting people to come out for the election. It was very difficult to get them out for the school election.

Q. You handled that right from the project?

A. Right from the property, yes.

(Testimony of Harry G. Beckwith.)

Q. You testified about these furnaces. In your opinion would not that enhance the marketability of the house to put new furnaces in?

A. If you didn't put a new one in you would not have any market.

Q. So, your answer is the new furnaces would increase the marketability, so to say?

A. Oh, yes.

Q. You testified on direct examination that no other improvements were made except little minor repairs and I want to ask you this: were any necessary to improve the marketability of the houses?

A. Not to improve the marketability. Those were new houses and a new house has to be serviced for a little while. Something goes wrong with the plumbing or ventilation, [81] and things like that.

Q. Were any of these houses sold without being rented at all?

A. No, I think every house had already been rented, had a renter in them.

Q. You say you think. Do you know?

A. I know.

Q. What do you base that knowledge on?

A. Because I was right in the project. Those houses were all together and I was right in there all the time.

Q. Did you keep any records on that?

A. If I kept them at that time I would not know where they are now. They were mostly memorandums.

Q. There were eighty-five houses in this project

(Testimony of Harry G. Beckwith.)

and you don't remember if you kept any records but apparently you remember that all the houses were rented? A. Yes.

Q. You are absolutely certain that of eighty-five houses you can remember that none of them were vacant? A. Yes.

Q. And I ask again what do you base that on?

A. My own knowledge.

Q. Well, it just seems kind of strange you would not remember if you kept any records.

A. I probably had a record of the rental of [82] the houses but I could not tell you now exactly what it was.

Q. With regard to the sales in 1946 you testified that no particular effort was made to sell the houses?

A. No campaign or anything of that kind.

Q. I will ask you again is it not true that none was necessary? A. That is right.

Q. I have no further questions.

Mr. Foster: The petitioners rest.

The Court: I would like to ask one or two questions. I think perhaps, unless the details are contained in these exhibits, which of course I have not had an opportunity to analyze—that is Exhibits 3, 4 and 5—I would say that there was nothing in here to indicate what was the manner in which these houses were sold when they were sold. That is, were they all sold to one purchaser, or sold to individuals?

Mr. Foster: I would be pleased to develop that.

The Court: I really think you have a burden

(Testimony of Harry G. Beckwith.)

here. As I recall the cases a man can go into the business of selling a development even if he is in another business before.

Mr. Foster: May I take the witness?

The Court: I am asking you so you can do that.

Mr. Butler: Those records do indicate the date of [83] the sales and that they were to individuals.

The Court: I know they are in evidence but is it accepted that they are correct? They were not put on with any witness on the stand and it seems to me there is at least a possibility as far as petitioner's burden is concerned, as it is now, that it has not been discharged. At least, I don't want the record left that way if I can help it.

Redirect Examination

By Mr. Foster:

Q. How were these houses sold, all at once or to individuals as they appeared?

A. To individuals as they appeared.

Q. Was it possible to sell all the houses at one time to a single purchaser?

A. No, there was no one available. No one came forward and it never entered our minds that anyone would buy the whole thing.

The Court: As I understand the stipulation these houses, sixty-eight houses, were sold in a period of a few months, October to December, each one to a different purchaser. I understood that it was testified there were no "For Sale" signs on the property but it seems to me there is still a question of how it happens that purchasers could be found for

(Testimony of Harry G. Beckwith.)

that many houses in that short a time unless some effort were made to produce them. Perhaps the answer is— [84] I am asking now because I think it is important to find the facts. It is possible they were continually asked for sales but turned them down until this situation arose but I think it has not been covered.

Q. (By Mr. Foster): Did you have any difficulty with some of the tenants in some of the property?

A. Some difficulty in getting rid of them, yes.

Q. Tell the Court what that difficulty was.

A. We were under this rental control at that time and after we told them these houses were going to be for sale they told us where we stood on it.

Q. And what do you mean by that?

A. They told us they would go up and see the rental agency in Yakima and that we didn't have the power to get them out.

Q. Did you have some tenants there that from your standpoint were not desirable?

A. Yes, we had several. You see one reason why thoses houses were sold at that time was in influx of the population around there. That little town just about doubled in population. People were coming in to go to work on the numerous things that were springing up around there. Among them were Okies and Arkies and people of that kind who had never lived in a house of that kind before. When they got [85] in they immediately began to wreck the houses, was the sum and substance of it. They didn't

(Testimony of Harry G. Beckwith.)

know how to behave in a house. Some of them had never even had a bathroom in a house before.

Q. How many tenants of that category did you have?

A. I don't remember—possibly a dozen.

Mr. Butler: I move to strike. He doesn't remember.

The Court: Deny the motion.

Q. During what period of time in 1946 did these sales occur? Did they occur all at once or throughout the year?

A. Oh, it was spread out throughout the year.

The Court: That is what I am puzzling about. I thought the first, these sixty-eight, were all sold between October and December.

Mr. Foster: No, the sales were spread throughout the year.

Q. (By Mr. Foster): Do you know—do you have any knowledge when those sixty-eight houses were sold in the calendar year of 1946?

A. They were sold at different times. There were at least twenty of them sold to G.I.s, and it takes some time to perfect a sale. There might be twenty come through all at one time but the sale was on the way of being perfected during that time and others who were assuming the mortgages [86] on the property would have to go through the processing and know whether they were capable of carrying that mortgage through.

Mr. Foster: That is all.

Mr. Butler: I think I have no further questions.

(Testimony of Harry G. Beckwith.)

Mr. Foster: Petitioners rest.

The Court: I am not going to pursue this any further, and I hope it is reasonably evident now in the record, but I am still puzzled as to the facts because as I recall it there was a time when Mr. Homann decided he wanted to sell the houses and the question of whether there was any alteration in the manner of operation at that time is the thing I was interested in and if so was it consistent.

Mr. Foster: I am quite sure there was no alteration. I will ask the question.

Q. In the months from October to December, 1946, was there any difference in your plan of disposing of these houses?

A. No. What do you mean by "alteration"?

Q. Did you inaugurate a speed-up campaign on those houses from October to December?

A. No.

Q. In that period of time your operation with respect to the disposition of those units was the same as in the balance of the year? [87]

A. That is right.

Mr. Foster: That is all.

Mr. Butler: I have no questions.

Mr. Foster: Petitioners rest.

The Court: As I understand, the testimony now is there was no change in the operation and that is the way the record is.

Mr. Butler: I might just say this, the rental records show that one of the houses was sold apparently before any were rented. That was in 1944.

Mr. Homann testified that that was refunded, that that was not an actual sale but there were sales in 1945 and further sales in 1946, and at least one we know of in 1947.

The Court: Well, the question is to find what these properties were held for primarily and as I say I hope the facts are in the record from which that can be determined.

Mr. Foster: I would like to recall Mr. Homann.

The Court: I take it there is no objection?

Mr. Butler: No objection.

A. G. HOMANN

Redirect Examination

By Mr. Foster:

Q. You have heard the discussion here that the sale of these 1946 houses were between October and December? A. Yes. [88]

Q. Do you have an explanation for that?

A. I heard the questions the Judge asked Mr. Beckwith and I would like to answer that. In making these sales and making loans the lending agencies, whether G.I. or private, would not process one loan at a time. We would have accumulated a group and they would make the process of the group together and that is why it shows in a lump in the income tax return. Actually, the sales were made throughout the year but not processed as far as loans, etc.

Q. And the processing of those applications occurred between October and December?

A. That is when they went through, yes. That is

(Testimony of A. G. Homann.)

when they were completed and brought in, because I had to sign all the papers and I remember they would hold up the processing—the sales were held up for quite a long period of time.

Q. After the sale was made what method was used in financing those sales?

A. Between the amount of the new loan and the sales price the buyer paid in cash.

Q. You took individual mortgages? You gave an individual mortgage—the purchaser gave an individual mortgage on the unit on which he purchased?

A. He refinanced it.

Q. The proceeds of that mortgage was used to retire the original mortgage loan? [89]

A. Yes.

Q. You were not a mortgagee?

A. My wife and I.

Q. You were not a mortgagor under the final purchaser's mortgage?

A. No, sir.

The Court: First of all, Mr. Foster, would you not indulge me by taking another look at this tax return and see if you can agree there were sixty-eight houses sold between October and December, there in 1946?

Mr. Foster: Yes.

The Court: Because the question you asked a moment ago still said '46.

Mr. Foster: I mis-spoke myself.

The Court: I realize this is going back to testimony of this morning. As I understand he testified there was a time he changed his frame of mind with

(Testimony of A. G. Homann.)

respect to this property. You then wanted to sell it because you needed the cash for this other construction? Is that correct?

A. That is correct.

Q. Can you tell me approximately when that took place?

A. It was in the early part of 1946 and when the bank refused to make me any loans and stated that I would have to start paying back what I had borrowed at the rate [90] of \$5,000 per month and it forced me to raise money and the only way I could raise any was from the sale of these houses. As I stated before, my money was tied up in the foreclosure deal.

Q. That is what I understood before. I want to follow through. Were you satisfied that the process of selling these houses was progressing sufficiently satisfactorily so you didn't have to take any means of increased sales once you made up your mind you were going to sell?

A. The houses were selling faster than we could get the renters out. What held the sales up was the fact the renters were in and had a right to stay. I had to wait so long to get them out. It was hard to get renters out. I had my own home practically wrecked by renters I had in and still could not get them out.

Q. I understand the delay in getting renters out but what I am asking about is the process of finding prospective purchasers for this property.

A. The G.I.s were coming back from the war and

twenty some of them had their applications in, I believe, at practically the same time. The Rosa project had started developing and people wanted to come in and get homes.

Mr. Foster: That is a new irrigation ditch going through Wenatchee and Sunnyside which put barren land in cultivation and a lot of new businesses came in [91] which followed with it and a lot of people came to work on this project.

A. That is right.

* * *

Filed November 13, 1955, T.C.U.S. [92]

The Tax Court of the United States

Docket Nos. 37318 and 37319

A. G. HOMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ANNA HOMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States, do hereby certify that the fore-

going documents, 1 to 21, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designations of Contents of Record on Review," excepting Petitioners' exhibits 1 thru 5, which are separately certified and forwarded herewith, as the original and complete record in the proceedings before the Tax Court of the United States entitled: "A. G. Homann, Petitioner, v. Commissioner of Internal Revenue, Respondent, Docket No. 37318" and "Anna Homann, Petitioner, v. Commissioner of Internal Revenue, Respondent, Docket No. 37319" and in which the Petitioners in the Tax Court proceedings have initiated appeals above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 20th day of April, 1955.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

[Endorsed]: No. 14737. United States Court of Appeals for the Ninth Circuit. A. G. Homann, Petitioner, vs. Commissioner of Internal Revenue, Respondent, and Anna Homann, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of the Tax Court of the United States.

Filed April 25, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

Docket No. 14737

ANNA HOMANN and A. G. HOMANN,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

STIPULATION

It is Hereby Stipulated that it is only necessary to print in the record herein the petition and answer in the case of A. G. Homann, Docket No. 37318, for the reason that the petition and answer in Docket No. 37319 is identical except in name.

/s/ HARRY ELLSWORTH FOSTER,
Counsel for the Petitioners on
Review.

/s/ H. BRIAN HOLLAND,
Counsel for the Respondent on Review, Assistant
Attorney General.

[Endorsed]: Filed May 11, 1955, U.S.C.A.

Docket No. 37318

A. G. HOMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SUPPLEMENTAL DOCKET ENTRIES

1955

Apr. 21—Transcript of original record sur petition for review sent Clerk U. S. Court of Appeals, Ninth Circuit.

June 21—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by G.C.

July 6—Proof of service filed.

July 14—Statement of points with proof of service by mail thereon, filed by G.C.

July 14—Designation of contents of record with proof of service by mail thereon, filed by G.C.

Docket No. 37319

ANNA HOMANN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SUPPLEMENTAL DOCKET ENTRIES

1955

Apr. 21—Transcript of original record sur petition for review sent Clerk U. S. Court of Appeals, Ninth Circuit.

June 21—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by G.C.

July 6—Proof of service filed.

July 14—Statement of points with proof of service by mail thereon, filed by G.C.

July 14—Designation of contents of record with proof of service by mail thereon, filed by G.C.

In the United States Court of Appeals
for the Ninth Circuit

T.C. Docket No. 37318

COMMISSIONER OF INTERNAL REVENUE,

Petitioner on Review,

vs.

A. G. HOMANN,

Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on March 1, 1955, ordering and deciding that there is a deficiency in income tax for the taxable year 1946 in the amount of \$5,922.70. This petition for review is filed pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

The respondent on review, A. G. Homann, is an individual with principal office and residence at Lacey, Washington. He filed his individual income tax return for the calendar year 1946 with the Collector of Internal Revenue for the District of Washington, located at Tacoma, Washington, and within

the judicial circuit of The United States Court of Appeals for the Ninth Circuit, wherein this review is sought.

Nature of Controversy

The issues decided against the Commissioner are (1) whether the basis for computation of gain on sale of rental housing held primarily for sale to customers should be reduced by an allowance for depreciation; and (2) whether the proceeds received from the sale of furnaces, refrigerators and ranges as salvage, which appliances were originally installed in houses held primarily for sale to customers in the ordinary course of taxpayer's business, are taxable as ordinary income or capital gain.

As to issue (1), the Commissioner reduced the basis of houses sold by depreciation. The Tax Court decided against the Commissioner and held that since from the inception taxpayer held the property primarily for sale it would not qualify for the "use in trade or business" requirement of the depreciation deduction. Accordingly, no reduction in basis for depreciation in computation of gain on sale was held to be proper.

With respect to issue (2), certain appliances originally installed in the houses were removed and sold for salvage. The Commissioner held that the proceeds received from the sale are taxable as ordinary income. The Tax Court held the resulting income was capital gain because taxpayer was not in the business of selling second-hand equipment,

and the items in question were not held for sale in the ordinary course of taxpayer's business.

/s/ H. BRIAN HOLLAND,

Assistant Attorney General;

/s/ JOHN POTTS BARNES,

Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Filed June 21, 1955, T.C.U.S.

Docket No. 37318

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To Harry Ellsworth Foster, Esquire, 501 Security
Building, Olympia, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of June, 1955, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of June, 1955.

/s/ JOHN POTTS BARNES,

Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 28th day of June, 1955.

/s/ HARRY ELLSWORTH FOSTER,
Counsel for Respondent on
Review.

Received June 29, 1955, D.D.I.R.

Filed July 6, 1955, T.C.U.S.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 37319

COMMISSIONER OF INTERNAL REVENUE,

Petitioner on Review,

vs.

ANNA HOMANN,

Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on March 1, 1955, ordering and deciding that there is a deficiency in income tax for the taxable year 1946

in the amount of \$6,202.94. This petition for review is filed pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

The respondent on review, Anna Homann, is an individual with principal office and residence at Lacey, Washington. She filed her individual income tax return for the calendar year 1946 with the Collector of Internal Revenue for the District of Washington, located at Tacoma, Washington, and within the judicial circuit of the United States Court of Appeals for the Ninth Circuit, wherein this review is sought.

Nature of Controversy

The issues decided against the Commissioner are (1) whether the basis for computation of gain on sale of rental housing held primarily for sale to customers should be reduced by an allowance for depreciation; and (2) whether the proceeds received from the sale of furnaces, refrigerators and ranges as salvage, which appliances were originally installed in houses held primarily for sale to customers in the ordinary course of taxpayer's business, are taxable as ordinary income or capital gain.

As to issue (1), the Commissioner reduced the basis of houses sold by depreciation. The Tax Court decided against the Commissioner and held that since from the inception taxpayer held the property primarily for sale it would not qualify for the "use in trade or business" requirement of the depreciation deduction. Accordingly, no reduc-

tion in basis for depreciation in computation of gain on sale was held to be proper.

With respect to issue (2), certain appliances originally installed in the houses were removed and sold for salvage. The Commissioner held that the proceeds received from the sale are taxable as ordinary income. The Tax Court held the resulting income was capital gain because taxpayer was not in the business of selling second-hand equipment, and the items in question were not held for sale in the ordinary course of taxpayer's business.

/s/ H. BRIAN HOLLAND,

Assistant Attorney General;

/s/ JOHN POTTS BARNES,

Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Filed June 21, 1955, T.C.U.S.

[Title of Court of Appeals and Cause.]

Docket No. 37319

NOTICE OF FILING PETITION
FOR REVIEW

To Harry Ellsworth Foster, Esquire, 501 Security
Building, Olympia, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of June, 1955, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for

the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of June, 1955.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 28th day of June, 1955.

/s/ HARRY ELLSWORTH FOSTER,
Counsel for Respondent on
Review.

Received June 29, 1955, D.D.I.R.

Filed July 6, 1955, T.C.U.S.

[Title of Court of Appeals and Cause.]

T. C. Docket Nos. 37318, 37319

STATEMENT OF POINTS

Comes Now the petitioner on review herein and makes this concise statement of points on which he intends to rely on the review herein, to wit:

The Tax Court of the United States erred:

1. In holding that since from the inception taxpayer held the property primarily for sale it would

not qualify for the "use in trade or business" requirement of the depreciation deduction, and that the Commissioner erred in reducing taxpayer's basis on account of depreciation "allowable."

2. In holding that the proceeds received from the sale of furnaces, refrigerators and ranges as salvage, which appliances were originally installed in houses held primarily for sale to customers in the ordinary course of taxpayer's business, are taxable as capital gain.

3. In failing to uphold the action of the Commissioner that the proceeds received from the sale of furnaces, refrigerators and ranges as salvage, are taxable as ordinary income.

4. In holding that there are deficiencies in income tax for the taxable year 1946 in the amount of \$5,922.70 in the case of A. G. Homann and in the amount of \$6,202.94 in the case of Anna Homann, rather than in the respective amounts of \$10,149.95 and \$10,457.70 as determined by the Commissioner.

5. In that its opinion and decisions are contrary to law and regulations.

/s/ H. BRIAN HOLLAND,

Assistant Attorney General;

/s/ JOHN POTTS BARNES,

Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Statement of Service attached.

Filed July 14, 1955, T.C.U.S.

The Tax Court of the United States
Washington

T. C. Docket Nos. 37318, 37319

COMMISSIONER OF INTERNAL REVENUE,

Petitioner on Review,

vs.

A. G. HOMANN, ANNA HOMANN,

Respondents on Review.

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, numbered 22 to 29, inclusive, constitute and are all of the original papers on file in my office, as called for by the "Designation of Contents of Record on Review," document 29 in this record, in the proceedings before The Tax Court of the United States entitled: "A. G. Homann, Petitioner, v. Commissioner of Internal Revenue, Respondent, Docket No. 37318," and "Anna Homann, Petitioner, v. Commissioner of Internal Revenue, Respondent, Docket No. 37319," and in which [petitioner in the Tax Court heretofore initiated appeals in which the record was forwarded on or about April 21, 1955] the respondent in the Tax Court later initiated these appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, supplementing those in the record on taxpayers'

appeals, and which original papers constitute a supplemental record.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court at the City of Washington in the District of Columbia this 20th day of July, 1955.

[Seal] /s/ VICTOR S. MERSCH,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 14737. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. A. G. Homann, Respondent, and Commissioner of Internal Revenue, Petitioner, vs. Anna Homann, Respondent. Transcript of the Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed July 21, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.